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## JURY TRIALS FOR VIOLENT HATE CRIMES IN RUSSIA: IS RUSSIAN JUSTICE ONLY FOR ETHNIC RUSSIANS?

NIKOLAI KOVALEV\*

*People are glad when we beat up a wog. When we jump on his head, when we kick out his teeth. They think "it's what I want to do, and they're doing it. Good lad. I'm afraid to join him but I sure won't stop him."*

*Skinhead Tesak*<sup>1</sup>

### INTRODUCTION

Almost every day in Russia migrant workers from Asia and Caucasus;<sup>2</sup> foreign students from Africa, the Middle East and Asia; and members of visual ethnic minorities become victims of racially-motivated attacks, which result in bodily injury or death of victims. These attacks are often launched by right-wing youth groups, such as skinheads (*britogolovye*) or neo-Nazis.<sup>3</sup> Besides illegal and legal immigrants and foreigners, skinheads attack Russian citizens of non-Slavic ethnic origin, in particular, members

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1. Statement made by Maxim Martsinkevich a.k.a. Tesak ("Hatchet") to British journalists. Interview by SBS/Dateline and Journeyman Pictures 2004 with Maxim Martsinkevich a.k.a. Tesak ("Hatchet") (July 26, 2004). (Transcript available at <http://www.journeyman.tv/?lid=17284&tmpl=transcript>).

2. The term *Caucasus* refers to the post-Soviet states of Armenia, Azerbaijan, Georgia; some southern parts of the Russian Federation, including Krasnodar Krai, Stavropol Krai, the autonomous republics of Adygea, Kalmykia, Karachay-Cherkessia, Kabardino-Balkaria, North Ossetia, Ingushetia, Chechnya, and Dagestan; and three territories which claim independence but which are not generally acknowledged as nation-states by the international community: Abkhazia, Nagorno-Karabakh and South Ossetia.

3. For more information on neo-Nazi skinheads in Russia, see generally, VIACHESLAV LIKHACHEV, *NATSIZM V ROSSII [NAZISM IN RUSSIA]* (2002); SERGEI BELIKOV, *BRITOGOLOVYE [SKINHEADS]* (2002); VIKTOR SHNIRELMAN, "CHISTIL'SHCHIKI MOSKOVSKIKH ULITS": SKINHEDY, *SMI I OBSHCHESTVENNOE MNIENIE* ['STREETCLEANERS OF MOSCOW: SKINHEADS, MASS MEDIA AND PUBLIC OPINION] (2007); Aleksandr Tarasov, *Natsi-skinny v sovremennoi Rossii [Nazi-Skinheads in Modern Russia]*, available at [http://scepsis.ru/library/id\\_605.html](http://scepsis.ru/library/id_605.html) (last visited Jan. 3, 2011); See generally, HILARY PILKINGTON ET AL., *RUSSIA'S SKINHEADS: EXPLORING AND RETHINKING SUBCULTURAL LIVES* (2010).

of Caucasian<sup>4</sup> and Asian ethnic groups.<sup>5</sup> In addition to people with the non-Slavic phenotype, skinheads regularly attack gays and those who represent various youth sub-cultures, such as punks, fans of rap music, and activists of anti-fascist and anarchist movements. There have also been incidents of attacks against homeless people.

However, it is not only the right-wing skinheads who demonstrate ethnic, racial, and religious intolerance against migrant workers and some ethnic minorities. Similar attitudes, although, perhaps less aggressive, have been steadily growing in general among citizens of Russian ethnicity.<sup>6</sup> According to surveys, among various ethnic groups, Russian citizens who belong to the Russian or Slavic ethnic groups, feel hostility first of all against Chechens, followed by Azeris, Armenians, and Roma.<sup>7</sup> Some of these surveys identified fear of terrorism as one of the reasons for this antagonism,<sup>8</sup> which was a result of both the two Russo-Chechen Wars and terrorist attacks carried out or claimed to have been carried out by Islamic fundamentalists against Russians in Moscow and other Russian cities in recent years.<sup>9</sup> In addition, mass media is stirring up the fear and hatred even more.<sup>10</sup>

4. Here natives of the Caucasus region should not be confused with a term defining white-skinned racial group.

5. It is interesting to note that some ethnic minorities living in Russia may have Slavic names and may belong to the Russian Orthodox Church, but may look different from Slavs. For instance, people of Altai origin may have Slavic first and last names, speak Russian as their native language but may appear Asian.

6. It is necessary to understand that the English term *Russian* has two meanings in the Russian language: (1) a person who has citizenship of the Russian Federation (*Rossiianin*); (2) a person who belongs to the Russian ethnic group (*Russkii*). According to the 2002 National Census, ethnic Russians (*Russkie*) constitute about 79% of population of the Russian Federation. FEDERAL'NAIA SLUZHBA GOSUDARSTVENNOI STATISTIKI [FEDERAL STATE STATISTICS SERVICE], VSEROSSIISKAIA PEREPIS' NASELENIIA [ALL-RUSSIAN NATIONAL CENSUS] 2002 (2002), available at <http://www.perepis2002.ru/>.

7. Lev Gudkov, *Antisemitizm v postsovetsoi Rossii* [Anti-Semitism in Post-Soviet Russia], in NETERPIMOST' V ROSSII: STARYE I NOVYE FOBII [INTOLERANCE IN RUSSIA: OLD AND NEW PHOBIA] 48 (G. Vitkovskaia and A. Malashenko eds., 1999); Leontii Byzov, *Zhdet li Rossiiu vsplesk russkogo natsionalizma* [Will Russia Have a New Wave of Russian Nationalism?], 4(72) MONITORING OBSHCHESTVENNOGO MNENIIA [PUBLIC OPINION MONITORING] 37, 41 (2004), [http://wciom.ru/fileadmin/Monitoring/72/s37-44\\_Journal\\_Monitoring72.pdf](http://wciom.ru/fileadmin/Monitoring/72/s37-44_Journal_Monitoring72.pdf); Ivan Sukhov, *Obraz vnutrennego vraga* [Image of an Internal Enemy], VREMIA NOVOSTEI, No. 147, Aug. 15, 2005, available at <http://www.vremya.ru/print/132048.html>.

8. See Byzov, *supra* note 7 at 41; See also Sukhov, *supra* note 7.

9. Among such attacks the following can be mentioned: hostage-taking of the hospital in Buden-novsk in July 1995 which resulted in 130 fatalities; bombing of apartment blocks in Moscow, Buynaksk and Volgograd in September 1999, killing 315 people; aircraft bombing in August 2004 killing 90 people; Moscow theatre hostage-taking in October 2002 resulting in death of 130 hostages; Beslan school hostage-taking in 2004 resulting in death of more than 330 hostages including 186 children. See, e.g., *Russian Terror Attacks Timeline*, GUARDIAN (London), Jan. 24, 2011, <http://www.guardian.co.uk/world/2011/jan/24/russian-terror-attacks-timeline>.

10. The main inspirer of the war on terror in Chechnya and all over Russia is the current Russian Prime Minister and former President Vladimir Putin, whose policies could be described by one of his

Another reason for animosity against ethnic groups such as Armenians, Azeris, Chinese, Vietnamese, Tajik, and Uzbek, is immigration and migration of these ethnic groups to provinces or districts with a majority Russian population. Members of the majority population believe that newcomers either “do not want to accept customs and behavioral norms adopted in Russia”, or “have no manners.”<sup>11</sup> In other words, some members of the Russian ethnic majority consider migrants as people of a different, alien culture who are reluctant to adapt to the Russian culture and customs. Migrant-phobia is also caused by the idea that many serious crimes in Russian cities are committed by ethnic criminal gangs (*etnicheskie prestupnye gruppirovki*) usually organized by migrants from the Caucasus: Georgians, Azeris, Chechens, and others. The high level of criminal activity among specific ethnic groups such as Roma, Chechens, and other ethnic groups is sometimes interpreted by Russian law enforcement agencies and journalists as characteristic of the ethnic culture of these groups.<sup>12</sup> For example, intolerance against migrants and foreigners from Central Asia, Caucasus, and Africa is based on the stereotype that people belonging to these ethnic groups are much more often than ethnic Russians involved in illegal drug trade.<sup>13</sup> Among other reasons of intolerance against migrants, ethnic Russians also cite the control by ethnic minorities of specific fields of business and competition in the labor market.<sup>14</sup>

A significant role in disseminating racial and ethnic intolerance in Russia is played by ultra-right political parties, such as LDPR (Liberal Democratic Party), *Rodina* (the Fatherland), and movements such as *Mestnye* (Locals), DPNI (*Dvizhenie protiv nelegal'noi immigratsii* or Movement Against Illegal Immigrants), Slavic Union (*Slavianskii Soiuz*) who target not only illegal immigrants per se, but all non-Slavs.<sup>15</sup> Moreover, the Rus-

renowned aphorisms: “And you should work like this in carrying your main task, which is fighting terrorists: strike decisively in the right place, at every cave, find those caves and exterminate [terrorists] hiding in them like rats.” Robert Parsons, *Russia Putin Singles Out Border Guards For Praise*, Radio Free Europe – Radio Liberty – Russia (Feb. 9, 2006), <http://www.rferl.org/content/article/1065602.html>.

11. Byzov, *supra* note 7, at 41.

12. Viktor Shnirelman, *SMI, etnicheskaia prestupnost' i migrantofobia* [Mass Media, Ethnic Criminality and Migrantophobia], *POLIT.RU*, (June 17, 2007, 10:40 PM), [http://polit.ru/research/2007/06/17/sova\\_print.html](http://polit.ru/research/2007/06/17/sova_print.html); Maksim Sokolov, *Prestupnost' i natsional'nost'* [Criminality and Ethnicity], *IZVESTIA*, Oct. 30, 2002, available at <http://www.izvestia.ru/sokolov/article25879/>.

13. Shnirelman, *supra* note 12; BELIKOV, *supra* note 3, at 35-37.

14. Byzov, *supra* note 7, at 41.

15. *SOVA Center for Information and Analysis*, Radical Nationalism in Russia and Efforts to Counteract it in 2006 (May 22, 2007), available at [http://www.sova-center.ru/en/xenophobia/reports-analyses/2007/05/d10896/#r2\\_4](http://www.sova-center.ru/en/xenophobia/reports-analyses/2007/05/d10896/#r2_4). It should be noted that the Moscow City Court has recently banned Slavic Union and DPNI for extremism in April 2010 and April 2011 respectively. See *Slavic Union*

sian Government either encourages or allows discrimination campaigns against migrants.<sup>16</sup> According to recent public opinion polls, many campaigns against illegal and sometimes even legal immigrants are supported by a significant proportion of the Russian population. For example, according to the public opinion poll conducted by Levada Centre in January 2011—answering the question *What do you think about the idea of “Russia for Russians” (Rossiia dlia Russkikh)?*—fifteen percent of respondents said that they had supported this idea for a long time and that it was necessary to put it into practice; forty-three percent stated that it would not be a bad idea to put it into practice, but within reasonable limits. Only twenty-four percent of respondents opposed this idea.<sup>17</sup>

From the judicial perspective high levels of ethnic and racial intolerance towards minorities raises the possibility of jury prejudice against minority victims in interracial crimes in Russia. The jury system, which was initially introduced in the Russian Federation in 1994 only in nine provinces, now exists in all regions of the Russian Federation, including the Republic of Chechnya.<sup>18</sup> To date, there have been several high-profile cases, in which according to the media, some politicians, human rights activists, and other observers, ethnic or racial bias allegedly influenced jury verdicts. Several such verdicts were reached in trials of Russian youths charged with murder and assault against foreigners and ethnic minorities. This article is based on a case study of four high-profile murder cases tried in Moscow and Saint Petersburg.

Due to the fact that in some cases the defendants were minors and their cases were tried *in camera*, this article will not disclose the names of the defendants. Due to ethical reasons the article does not mention names of lawyers, judges, and prosecutors who were interviewed during the collection of data. The cases are labeled as Case 1, Case 2, Case 3, and Case 4. In all these cases, during the first round of trials, juries acquitted defendants charged with murder of victims. The goal of this study was to explore

*Banned*, THE MOSCOW TIMES, (Apr. 28, 2010); *Court Bans Leading Nationalist Group*, THE MOSCOW TIMES, (Apr. 19, 2011).

16. For example, during the anti-Georgian campaign in October 2006 sponsored by the Russian Government in response to the arrest of Russian officers in Georgia on charges of espionage, Russian authorities hunted for illegal immigrants of Georgian origin and deported about 130 of them back to Georgia. One of the methods used by the Russian police to find Georgian immigrants was drawing up lists of pupils with Georgian surnames in Moscow schools. See *Putin Calls for Georgia Pressure*, BBC (Oct. 6, 2006, 10:14 PM ), <http://news.bbc.co.uk/2/hi/europe/5415014.stm>.

17. Levada Centre, *Natsionalizm v sovremennoi Rossii* [Nationalism in Modern Russia] (Feb. 4, 2011), <http://www.levada.ru/press/2011020407.html>.

18. Russia Today, *Chechnya's First Jury Court Starts*, RT (Apr. 26, 2010, 12:06), <http://rt.com/news/chechnyas-first-jury-court/> (The first jury trial in Chechnya was conducted in April 2010).

whether there is evidence to suggest that juries might have reached their verdict on the basis of prejudice against victims and disregarded evidence of the defendants' guilt.

The article consists of eight sections. Section I provides a short overview of skinhead hate violence in Russia. Section II discusses recent anti-jury legislation and the proposed bill which aims to abolish jury trials in hate-motivated murder cases. Section III explains the methodology of the study. Section IV considers issues of jury selection. Section V analyzes evidence presented before the juries and behavior of parties during trials. Section VI discusses media coverage before and during trials which could have influenced the decisions of juries in these cases. Section VII examines verdicts delivered in each case and how verdicts were evaluated by parties and judges. Section VIII analyzes grounds on which the prosecution appealed against the verdict in each case and subsequent judgments of the Supreme Court of the Russian Federation.

## I. SKINHEAD VIOLENCE IN RUSSIA

Skinheads, or as they are sometimes called in the Russian language *britogolovye*, appeared in Russia in the early 1990s in Moscow.<sup>19</sup> In 1993–1994, the first skinhead groups were organized in other major Russian cities: Saint Petersburg, Rostov-on-Don, and Volgograd.<sup>20</sup> According to some experts, within a decade the number of Russian skinheads increased very quickly from one thousand in the middle 1990s to about 80,000 by 2004, turning Russia into the “home to half of the world’s skinheads.”<sup>21</sup> According to the most recent unofficial estimates in the beginning of 2007, there were at least 100,000 skinheads in the Russian Federation.<sup>22</sup> Although not all young people who shave their heads can be considered as neo-Nazi<sup>23</sup> and not all Russian national-socialists have close-cropped or

19. PILKINGTON ET AL., *supra* note 3, at 5; BELIKOV, *supra* note 3, at 17.

20. BELIKOV, *supra* note 3, at 19.

21. Alexander Brod, *Pravozashchitnik v Rossii 70 tysiach skinhedov*, BBC, (May 7, 2007, 12:47 PM GMT), [http://news.bbc.co.uk/1/hi/russian/russia/newsid\\_6631000/6631629.stm](http://news.bbc.co.uk/1/hi/russian/russia/newsid_6631000/6631629.stm); Graeme Smith, *From Russia With Hate Angry Young Men are Joining a Growing Legion of Skinheads, and the police are Doing Little to Halt Their Violence*, GLOBE AND MAIL, Apr. 26, 2006, <http://v1.theglobeandmail.com/servlet/story/RTGAM.20060426.wxruusia26/BNStory/RussiaShrinks/home/>, PILKINGTON ET AL., *supra* note 3, at 9.

22. Anton Grishin, *Skinhead Russia*, MOSCOW NEWS, Sept. 7, 2007, at 20.

23. On the one hand, in Russia a close-cropped or shaved head has been a long-standing fashion attribute among ordinary (not right-wing) criminals. On the other hand, in the skinhead subculture there are anti-fascist (SHARPs – Skinheads Against Racial Prejudices), left-wing (“red” skinheads) and anarchist groups who do not share the neo-Nazi ideology and openly oppose it. However, the number of anti-Nazi skinheads is not significant in comparison to “brown” (Nazi) skinheads. See BELIKOV, *supra* note 3, at 52–54.

shaved heads, it can be argued that the terms racist, fascist, and skinhead became synonyms in Russia today. Similar to their “Aryan” “brothers-in-arms” in Europe and North America, Russian skinheads adhere to certain symbols, ideology, and style in clothing and accessories.<sup>24</sup>

There is no one single organization in Russia which would unite all skinheads and neo-Nazis. In fact, some right-wing organizations, for instance Blood & Honour, promote organization of independent cells in every big city rather than a united organization. Such decentralized structure of skinhead gangs makes skinhead gangs less vulnerable to criminal investigation. These groups have no formal membership and include about ten to twenty people.<sup>25</sup> Competition for leadership inside groups, arrests, and conviction of skinhead leaders for hate crimes split up gangs, and they are replaced by new groups. At the same time, there are several well-structured and developed skinhead groups in Moscow and Saint Petersburg, which sometimes collaborate with international racist organizations. One of the oldest skinhead organizations established in Russia is “Blood & Honour/Combat 18 Russia” (Krov’ & Chest’), which is a Russian chapter of the international neo-Nazi music promotion network “Blood & Honour.”<sup>26</sup> The European Blood & Honour centre initially did not recognize “BH Russia” as their division because instead of simple promotion of Nazi ideas in music, Russians started committing violent crimes including assaults and murders. However, Europeans later acknowledged them as their “brothers.” It was members “Blood & Honour Russia” who contrived an operation called “white carriage” (belyi vagon) where several skinheads enter the carriage of the train, block access to emergency buttons, cover the view from other carriages, and attack several passengers.<sup>27</sup>

The circle of victims targeted by the skinhead gangs is very broad but most frequent victims can be categorized into several groups: (1) ethnic

24. Besides close-cropped or shaved heads, skinheads usually have very distinct clothes and accessories such as, for example, heavy boots produced by Dr. Martens (also known as DMs, Docs, Doc Martens) and Grinders; bomber jackets; braces and badges sewn-on fabric patches with racist letters, and all forms of Swastika. See Anti-Defamation League, *Hate on Display Extremists Symbols, Logos and Tattoos*, [http://www.adl.org/hate\\_symbols/default.asp](http://www.adl.org/hate_symbols/default.asp) (last visited Jan. 3, 2011); BELIKOV, *supra* note 3, at 20; LIKHACHEV, *supra* note 3, at 111-112; Tarasov, *supra* note 3. At the same time Russian skinheads can wear some accessories or symbols peculiar to Slavic or Russian culture: patches with either current Russian national flag or first official flag of the Russian Empire.

25. LIKHACHEV, *supra* note 3, at 116.

26. According to the “Blood & Honour” official website, the network includes 17 divisions in Argentina, Bulgaria, Chile, Czech Republic, England, Lithuania, the Netherlands, Poland, Russia, Slovakia, Sweden, Ukraine, and United States. See *Blood & Honour*, [www.bloodandhonour.com/](http://www.bloodandhonour.com/) (last visited Nov. 22, 2007).

27. Olga Bobrova, *Russkie fashisty intelektualy i otmorozki* [Russian Fascist Intellectuals and Thugs], NOVAYA GAZETA, Oct. 20, 2004, <http://www.novayagazeta.ru/data/2004/80/22.html>.

minorities of Central Asian (Uzbeks, Tajiks, Kyrgyzs etc.) and Caucasus (Armenians, Azeri, Dagestani etc.) origin; (2) students of Asian, African, and Middle Eastern origin; and (3) activists of Anti-fascist and leftist movements and members of youth subcultures (for example, Punks, Rappers, Goths, and graffitists) who are perceived by skinheads as ideological and cultural rivals.<sup>28</sup>

Based on news reports and available statistics, the most vulnerable group of victims of skinhead violence is migrant workers from Central Asia and Caucasus. For example, according to data collected by the SOVA Center in 2008, there were at least 61 murdered and 123 injured victims of the Central Asian origin and 27 murdered and 76 injured victims of the Caucasus origin.<sup>29</sup> Many of these victims were attacked either on the street, at their place of work, or on public transportation. Offenders choose most of their victims randomly. They may plan an attack in advance, but the personality of the actual victim is irrelevant to them. The potential victim could be anyone who looks like an ethnic minority, for example dark-skinned and having some distinct facial features. The offenders cannot always identify the origin of the victim and, in some cases, attack persons of Slavic origin whom they mistook for ethnic minorities.<sup>30</sup> Typically, an attack is carried out by a group of skinheads against a single victim giving the latter no chance to escape and survive. Sometimes attacks are recorded by one of the members of the gang to present it as evidence of their campaign and to promote hate violence on the Internet.<sup>31</sup>

Before discussing the actual level of hate criminality in Russia, it is necessary to provide a brief overview of the Russian substantive criminal law defining hate and bias crimes. First of all, according to Article 63(1)(e) of the Criminal Code of the Russian Federation (CC RF),<sup>32</sup> commission of

28 . GALINA KOZHEVNIKOVA, MANIFESTATIONS OF RADICAL NATIONALISM AND EFFORTS TO COUNTERACT IT IN RUSSIA DURING THE FIRST HALF OF 2010 (2010), *available at* <http://www.sova-center.ru/en/xenophobia/reports-analyses/2010/07/d19436/> (see Appendix). BELIKOV, *supra* note 3, at 62-67.

29. KOZHEVNIKOVA, *supra* note 28.

30. For instance, in January 2007, a teenage skinhead gang "ZIG-88" from Ekaterinburg murdered a Russian man Vasily Poduzov who was mistaken for a migrant. Arsenii Vaganov, *Ubiistvo bez belykh shnurkov*, GAZETA.RU, June 30, 2008, <http://gazeta.ru/social/2008/06/30/2770469.shtml>. The same year another Russian Sergei Komkov was mistaken by a group of youths for a non-Russian worker in Omsk. See Igor Butorin, *Ikh bor'ba skinhedy ubili russkogo parnia*, IZVESTIYA, Feb. 7, 2008, <http://www.izvestia.ru/novosibirsk/article3112806/?print>.

31. Skinheads upload video clips with hate violence to forums, extremists' websites and even on popular websites such as YouTube. While writing this article, the author watched several such video clips on YouTube. Most of such clips were subsequently removed from YouTube.

32. UGOLOVNYI KODEKS ROSSIISKOI FEDERATSII [Criminal Code] (Russ.) *available at* <http://www.garant.ru/iv/> [hereinafter UK RF]. (adopted by the State Duma on May 24, 1996, approved



a crime with motive of political, ideological, racial, ethnic, or religious hatred or animosity or hatred against a social group<sup>33</sup> is an aggravating factor in considering sentence. Secondly, the CC RF contains several articles or sections that specifically recognize hate motive (*motiv nenavisti*) as an essential element of a crime.<sup>34</sup> These crimes can be divided into several groups: violent crimes against the person (murder,<sup>35</sup> battery causing grave bodily harm,<sup>36</sup> battery causing medium bodily harm,<sup>37</sup> battery causing minor bodily harm,<sup>38</sup> simple battery,<sup>39</sup> torture,<sup>40</sup> threat of murder<sup>41</sup>), crimes against public security (hooliganism,<sup>42</sup> vandalism<sup>43</sup> and incitement of hatred<sup>44</sup>), crimes against public morality (outrages upon bodies of the deceased and their burial places<sup>45</sup>), and crimes against family and juveniles (involvement of a minor in the commission of a crime).

Moreover, Russian law provides criminal sanctions for the organization of and participation in extremist gangs created for commission of hate crimes.<sup>46</sup> Like many other countries, Russia adopted a sentence-enhancement approach to hate criminality, and, in theory, offenders who commit hate crimes should be sentenced to a more severe punishment than those who commit similar crimes, but without a hate motive. For instance, while a murder committed without a hate motive or any other aggravated circumstances is punishable by the maximum sentence of fifteen years of imprisonment, the offender who committed a murder with a hate motive can be sentenced to life or death penalty under the Russian criminal law.<sup>47</sup> In practice, however, judges rarely sentence racist offenders to lengthy imprisonments, life sentences, or the death penalty, mainly due to the limits in sentences for minor offenders or offenders between fourteen and eigh-

by the Federation Council on June 5, 1996, and signed by the President of the Russian Federation on June 13, 1996; with amendments as of December 23, 2010).

33. The phrase "social group" was added to the text of the Criminal Code by the Federal Law, 211-FZ (July 27, 2007) (Russ.), and is interpreted very broadly by Russian courts.

34. UK RF, *supra* note 32.

35. *Id.* at art. 105(2)(l).

36. *Id.* at art. 111(2)(e).

37. *Id.* at art. 112(2)(e).

38. *Id.* at art. 115(2)(b).

39. *Id.* at art. 116(2)(b).

40. *Id.* at art. 117(2)(z).

41. *Id.* at art. 119(2).

42. *Id.* at art. 113(1)(b).

43. *Id.* at art. 114(2).

44. *Id.* at art. 282.

45. *Id.* at art. 244(2)(b).

46. *Id.* at art. 282.1.

47. *Id.* at art. 105.

teen years of age.<sup>48</sup> Thus, according to Article 57(2) and Article 59(2) of the CC RF, persons who are younger than eighteen at the moment of the commission of the crime cannot be sentenced to life imprisonment or the death penalty.<sup>49</sup> Moreover, the maximum sentence which can be imposed to a minor offender for any crime cannot be more than ten years of imprisonment.<sup>50</sup>

According to statistics of racist and neo-Nazi attacks in Russia gathered by the SOVA Center, there are hundreds of victims of such attacks each year, and their number has been growing rapidly until recently. For example, in 2004 the number of killed and injured victims in all Russian cities was 269 (50 killed and 219 injured), in 2005 this number increased to 468 (49 killed and 419 injured), in 2006 it was 588 (66 killed and 522 injured) and in 2007 it increase even more to 720 (97 killed and 623 injured).<sup>51</sup> Although the total number of victims of racist attacks in 2008 decreased to 615, the number of murders increased from 97 in 2007 to 116 in 2008.<sup>52</sup> According to the SOVA Center monitoring project, 2009 and 2010 was the first period during the last six years when the number of incidents of racist and neo-Nazi violence decreased significantly, even though it remains high overall: at least 84 were killed and at least 433 were injured in such incidents in 2009 and at least 38 were killed and 377 injured in 2010 (preliminary data released January 3, 2011).<sup>53</sup>

It has to be noted, however, that these figures only represent crimes reported in the media, Internet blogs, and other public sources monitored by the SOVA Center. It can be suggested that many hate and bias crimes remain unregistered due to several factors. First, victims of hate crimes not resulting in a fatality do not always report the crime to the police because they either have no confidence that the police will investigate and bring the offender to justice or because they fear deportation from Russia, as many victims do not have a legal immigration status.<sup>54</sup>

Second, even if a victim of a hate crime reports it to the police, or the victim has been killed and the body was found with signs of a potential

48. *Id.* at art. 87(1).

49. *Id.* at art. 57(2) and 59(2).

50. *Id.* at art. 88(6).

51. KOZHEVNIKOVA, *supra* note 28.

52. *Id.*

53. *Id.*; SOVA Center, *Winter 2010-2011 December and Its Consequences*, SOVA CENTER (May 6, 2011), <http://www.sova-center.ru/en/xenophobia/reports-analyses/2011/05/d21571/>.

54. LIKHACHEV, *supra* note 3, at 120.

hate murder,<sup>55</sup> the police officer can either refuse to register the facts of the crime or register the crime without referencing the possible hate motive. The reluctance of police to register hate crimes can be explained by several reasons. Since hate crimes are on the rise in Russia, the police do not have sufficient resources to investigate all of them properly and the high number of crimes—especially unsolved crimes—has been treated as a negative indicator of the crime-prevention performance of the law enforcement agencies in Russia. Hence, the police are interested in keeping the rate of registered hate crimes as low as possible. Another reason for not registering some types of crimes, for instance, murder, as hate crimes is that the accused charged with hate murder is eligible for a trial by jury where the chances of acquittal are much higher than in a bench trial.<sup>56</sup>

As opposed to the United States and other countries where statistics on hate crimes are collected and available to the public, Russia has no official statistics on hate criminality besides isolated reports or newsletters released by the Office of the Prosecutor or the Ministry of Internal Affairs (hereinafter MIA). Moreover, statistics collected by law enforcement agencies in Russia indicate an even smaller portion of hate crimes committed in Russia. For instance, according to SOVA Center, there were at least 114 homicides with a racist motive in 2008, while the MIA statistics account only for 17 registered homicides with racist motives.<sup>57</sup>

## II. ANTI-EXTREMIST AND ANTI-JURY LEGISLATION

Russian federal and municipal authorities often acknowledge the danger of hate violence in public speeches or during meetings with the media. For example, current President Dmitry Medvedev, during his opening speech at the Ministry of Internal Affairs' meeting, said:

Manifestations of extremism have been causing great concerns recently. Last year even with a general decrease in criminality the crime rate for these offences increased by one third. . . . These crimes inflict significant damage and are a systemic threat to the existence of our society.<sup>58</sup>

55. These signs might include multiple wounds caused by different weapons, decapitation of the body or other signs of cruelty caused to the corpse.

56. See e.g. NIKOLAI KOVALEV, *CRIMINAL JUSTICE REFORM IN RUSSIA, UKRAINE AND THE FORMER REPUBLICS OF THE SOVIET STATES: TRIAL BY JURY AND MIXED COURTS* 149 n.171, 173 n.212 (2010). Russian juries have acquitted defendants much more often than professional judges: during the past fifteen years acquittal rates in bench trials were in the range of 0.5-1% and in jury trials varied from 10 to 22.9%.

57. KOZHEVNIKOVA, *supra* note 28.

58. Prezident Rossiiskoi Federatsii [President of the Russian Federation], *Vstupitel'noe slovo na rasshirennom zasedanii kollegii Ministerstva vnutrennikh del* [Introduction at the meeting with committee of the Ministry of Internal Affairs] (Feb. 6, 2009, 10:45 AM), <http://kremlin.ru/transcripts/3075>.

Prime Minister Vladimir Putin has also expressed concerns about the growth of hate violence. For example, when answering a question regarding a brutal murder of a prominent Yakut chess player by a skinhead gang in Moscow and the “lenient” sentence received by the offenders,<sup>59</sup> Mr. Putin pointed out that punishment should be inevitable and that “he trusts that the criminal justice system will work effectively” and “will bring people who commit such crimes to their senses.”<sup>60</sup>

The level of hate criminality in general and skinhead violence in particular has become so significant that Russian authorities had to introduce new anti-extremism legislation and develop other new measures to fight hate violence. Between 2006 and 2008, the Russian Parliament amended the federal law “On Counteraction Against Extremist Activity” four times.<sup>61</sup> In particular, the law of the 24 July 2007 changed the definition of extremism.<sup>62</sup> The “commission of a crime with a motive of political, ideological, racial, ethnic or religious hate or animosity or with a motive of hate or animosity against any social group” is considered extremism.<sup>63</sup> This means that any skinhead committing an assault or murder with a hate motive has to be categorized as an extremist. The same law introduced administrative responsibility<sup>64</sup> for distribution of extremist materials. Materials have to be determined as extremist and proscribed by the decision of a Russian Federal court and included in the Federal List of Extremist Materials (FLEM).<sup>65</sup> As of April 2011, the FLEM included titles of 810 books,

59. A Chess player, Sergei Nikolaev, was murdered by a group of Moscow skinheads on October 20, 2007. *Ubivshim iakutskogo shakhmatista skinhedam vynesen prigovor* [Skinheads who Murdered the Yakut Chess pPayer Received the Sentence], LENTA.RU, Sep. 22, 2008, <http://www.lenta.ru/news/2008/09/22/skins/>.

60. Pravitel'stvo Rossiiskoi Federatsii [The Government of the Russian Federation], Stenogramma teleprogrammy “Razgovora s Vladimirom Putiny” [Transcript of the TV Program “Talk with Vladimir Putin”] (Dec. 4, 2008, 12:00 PM), <http://premier.gov.ru/events/news/2638/>.

61. Federal'nyi Zakon RF o Protivodeistvii Ekstremistskoi Deiatel'nosti [Federal Law of the Russian Federation on Counteractions Against Extremist Activity] No. 114-FZ (April 29, 2008) (Russ.) available at <http://www.garant.ru/iv/>.

62. Federal'nyi Zakon RF o Vnesenii izmenenii v otdel'nye zakonodatel'nye akty Rossiiskoi Federatsii v sviazi s sovershenstvovaniem gosudarstvennogo upravleniia v oblasti protivodeistviia ekstremizmu [Federal Law of the Russian Federation on amendments to certain legislative acts in relation to improvement of the public administration in the area of anti-extremism] ot 24 iuliia 2007 No. 211-FZ, Ros. Gaz., Aug. 1, 2007, available at <http://www.rg.ru/2007/08/01/extremizm-izmeneniia-dok.html>.

63. *Id.* at art. 4.

64. *Id.* at art. 6. As opposed to common law jurisdictions where minor offences are called misdemeanors, the Russian law has a special type of delinquent acts of minor character called administrative delinquencies (*administrativnye pravonarusheniia*).

65. Ministerstvo Iustitsii Rossiiskoi Federatsii [Ministry of Justice of the Russian Federation], *Federal'nyi spisok ekstremistkikh materialov* [Federal List of Extremist Materials], <http://www.minjust.ru/ru/activity/nko/fedspisok> (last visited Apr. 20, 2011).

video clips, brochures, posters, lyrics of the songs, musical albums, and addresses of Internet websites.<sup>66</sup>

In September 2008, President Medvedev by his Decree ordered the establishment of a special anti-extremism branch (*podrazdeleniia po protivodeistviu ekstremizmu*) within police forces.<sup>67</sup> In addition to these reasonable measures, the Russian government has been gradually introducing legislation that may eventually deprive defendants charged with extremism of their fair trial rights, including the constitutional right to a jury trial.<sup>68</sup>

The process of curtailment of jury trials started in December 2008 when, despite the appeal to President Medvedev by the Public Chamber<sup>69</sup> and non-governmental organizations and human rights groups,<sup>70</sup> the President signed the law abolishing juries for such political crimes as high treason, terrorist acts, espionage, armed rebellion, forcible seizure of power, sabotage, organization of armed formation, hostage-taking, and mass riots.<sup>71</sup> One of the main justifications for abolition of jury trials in cases of terrorism was the claim of the bill's authors that there have been too many acquittals for these types of crime in North Caucasus due to tribalism, anti-

66. *Id.*

67. Ukaz Prezidenta Rossiiskoi Federatsii o Nekotorykh voprosakh Ministerstva vnutrennikh del Rossiiskoi Federatsii [Decree of the President of the Russian Federation On issues of Ministry of Internal Affairs of the Russian Federation], No. 1316 (signed on Sep. 6, 2008), available at <http://document.kremlin.ru/doc.asp?ID=047712>.

68. KONSTITUTSIIA ROSSIISKOI FEDERATSII [CONSTITUTION] 1993, art. 20, 47, 123 (Russ.).

69. The Public Chamber of the Russian Federation (*Obshchestvennaia Palata*), which was created by President Putin in 2005, consists of 126 elected members and has consultative powers. Among its functions are the following: analyzing draft legislation; monitoring of the activities of the parliament, government and other state bodies; and making suggestions for new laws. On December 26, 2008 in its letter to President Medvedev the Public Chamber urged the President to veto the law on abolition of juries in political trials passed by the Russian Parliament. *Obshchestvennaia Palata* [Public Chamber], *Obrashchenie Obshchestvennoi palaty Rossiiskoi Federatsii v sviazi s priniatiem Federal'nym Soboraniem Rossiiskoi Federatsii federal'nogo zakona "O vnesenii izmenenii v otdel'nye zakonodatel'nye akty Rossiiskoi Federatsii po voprosam protivodeistviia terrorizmu,"* [Appeal of the Public Chamber of the Russian Federation in relation to adoption by the Federal Assembly of the Federal Law on amendments to certain laws of the Russian Federation on issues of anti-terrorism], (Dec. 26, 2008), <http://www.oprf.ru/files/sudy.doc..>

70. See, e.g., the Appeal of the Conference of Human Rights Groups of the Russian Federation to the President Medvedev dated December 12, 2008. The letter was signed by the chairs and presidents of main human rights organizations such as the Moscow Helsinki Group, Civic Assistance Committee, Andrei Sakharov Foundation, Human Centre "Memorial" and Social Movement "For Human Rights." Memorial Human Rights Center, *Pravozashchitniki prizyvaiut garanta Konstitutsii RF otklonit' zakon o sokrashchenii kompetentsii sudov prisiazhnykh* [Human Rights Activists are Urging the Guarantor of the Constitution to Veto the Law on Reduction of Jurisdiction of Juries], MEMORIAL (Dec. 12, 2008), <http://www.memo.ru/2008/12/12/1212083.htm>.

71. Federal'nyi zakon RF o Vnesenii izmenenii v otdel'nye zakonodatel'nye akty Rossiiskoi Federatsii po voprosam protivodeistviia terrorizmu [Federal Law of the Russian Federation on Counteractions Against Terrorism], No. 321-FZ (Dec. 30, 2008), available at <http://www.garant.ru/iv>.

government bias, and jury intimidation.<sup>72</sup> The sponsors of the law, however, did not provide any data on alleged jury intimidation or bias during parliamentary hearings, and the law passed very quickly, coming into force in January 2009.<sup>73</sup> The Constitutional Court of the Russian Federation, which has the power of constitutional review,<sup>74</sup> considered an issue of constitutionality of the anti-jury law in April of 2010.<sup>75</sup> In its majority decision of April 19, 2010, the Constitutional Court dismissed the application of five defendants<sup>76</sup> charged with terrorism, which challenged the constitutionality of the law that abolished juries in terrorism cases. The Court held, *inter alia*, that jury trial is neither an inalienable right nor a mandatory condition for providing judicial protection of individual's rights and freedoms and that the Constitution only guarantees it in cases punishable by death penalty.<sup>77</sup> Moreover, the Court pointed out that since Russia has a moratorium on the imposition of death sentences, the government is not obliged to grant jury trial as an essential safeguard of the right to life.<sup>78</sup>

Although technically this decision is not unreasonable, it demonstrates the vulnerability of the right to jury trial in Russia where there are no clear constitutional guarantees. As opposed to the Canadian Charter of Rights and Freedoms, which guarantees the right to trial by jury "where the maximum punishment for the offence is imprisonment for five years or a more severe punishment,"<sup>79</sup> or the United States' Bill of Rights, which grants

72. O Proekte Federal'nogo Zakona No. 123532-5 'O Vnesenii izmenenii v Otdel'nye Zakonodatel'nye Akty Rossiiskoi Federatsii Po Voprosam Protivodeistviia Terrorizmu' [On Draft Federal Law No. 123532-5 "On Amendments to Certain Legislative Acts on Counteractions Against Terrorism] *Parlamentskie Slushaniia v Gosudarstvennoi Dume* [Parl. Sluch.] [Parliamentary Hearings in the State Duma], Dec. 5, 2008, Bulletin No. 59(1032), part. 1, pp. 64-77, *available at* <http://www.cir.ru/docs/duma/302/2009141?QueryID=3461865&HighlightQuery=3461865> (In particular, see speech by the Head of the State Duma Security Committee Vasil'ev V.A.).

73. Federal Law of the Russian Federation on Counteractions Against Terrorism, *supra* note 71.

74. See generally ALEXEI TROCHEV, *JUDGING RUSSIA: CONSTITUTIONAL COURT IN RUSSIAN POLITICS, 1990-2006* (2008).

75. Postanovlenie Konstitutsionnogo Suda RF ot 19 apreliia 2010 g. [Ruling of Russian Federation Constitutional Court of Apr. 19, 2010, No. 8-P.] (April 19, 2010), *available at* <http://www.ksrf.ru/Decision/Pages/default.aspx>.

76. Applicants were charged with terrorism in different provinces of the Russian Federation and all of them were deprived of jury trials by decisions of different courts: Zainagutdinov was refused a jury trial by the Supreme Court of Bashkyrtostan; Faizulin and Khasanov were refused a jury trial by the Supreme Court of the Republic of Tatarstan; Kudaev was refused a jury trial by the Supreme Court of the Kabardino-Balkar Republic. Due to the very similar nature of these applications the Constitutional Court decided to combine them into one case.

77. *Id.* at 9-11 ¶2.1, ¶2.2.

78. *Id.* at 11 ¶2.2.

79. Canadian Charter of Rights and Freedoms, Part I (Schedule B to the Canada Act, 1982, c.11, s.11(f) (U.K.). of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, s. 11(f) (U.K.).

jury trials in “all criminal prosecutions,”<sup>80</sup> the Russian Constitution contains more ambiguous jury clauses. On the one hand, Article 20 of the Russian Constitution guarantees the right to trial by jury in cases punishable by the death penalty.<sup>81</sup> On the other hand, however, the Constitution does not restrict trial by jury only to crimes punishable by the death penalty. On the contrary, Article 47 of the Constitution states: “The accused shall have the right to the examination of his case by a jury in cases envisaged by the federal law.” Moreover, Article 123 of the Constitution declares: “In cases fixed by the federal law justice shall be administered by a court of jury.”<sup>82</sup> In other words, the Parliament of the Russian Federation can decide to allow juries to consider any criminal case.

At the same time, the wording of Articles 20, 47 and 123 of the Russian Constitution, with respect to the jurisdiction of trial by jury, opens up the possibility of different interpretations. Apparently, the current government and the Constitutional Court of Russia are leaning towards the position that, ultimately, the Constitution obliges the government to provide the right to jury trials only in capital cases.<sup>83</sup> Moreover, it can be suggested that the abolition of death penalty may allow the government to eliminate the jury system altogether. This argument was presented by Mr. Krotov, representative of the President of the Russian Federation, in the Constitutional Court during the constitutional hearing in April 2010.<sup>84</sup> This position of the government and the majority of the Constitutional Court, however, has been strongly criticized by two dissenting opinions of Justices Gadzhiev<sup>85</sup> and Vladimir Iaroslavl'tsev.<sup>86</sup>

Some of the arguments proposed by the dissenting Justices can be summarised as follows. First, although the death penalty has not been practiced in Russia since 1996, it has not been officially abolished; hence, the trial by jury cannot be abolished in cases punishable even in theory by death penalty.<sup>87</sup> Second, the exclusion of lay citizens from the justice sys-

80. U.S. CONST. amend. VI.

81. KONSTITUTSIJA ROSSIJSKOI FEDERATSII [CONSTITUTION] 1993, art. 20 (Russ.).

82. *Id.* at art. 123.

83. *Id.* at art. 20.

84. See Dissenting Opinion of Justice Gadzhiev to the Ruling of the Russian Federation Constitutional Court of Apr. 19, 2010, *Postanovlenie Konstitutsionnogo Suda RF ot 19 aprelija 2010 g.* [Ruling of Russian Federation Constitutional Court of Apr. 19, 2010, No. 8-P.], 29–30 (April 19, 2010) available at <http://www.ksrf.ru/Decision/Pages/default.aspx>.

85. *Id.* at 29–40.

86. See Dissenting Opinion of Justice Iaroslavl'tsev to the Ruling of the Russian Federation Constitutional Court of Apr. 19, 2010, , *Postanovlenie Konstitutsionnogo Suda RF ot 19 aprelija 2010 g.* [Ruling of Russian Federation Constitutional Court of Apr. 19, 2010, No. 8-P.], 40–63 (April 19, 2010) available at <http://www.ksrf.ru/Decision/Pages/default.aspx>.

87. *Id.* at 45.

tem violates the constitutional right of citizens to participate in the administration of justice.<sup>88</sup> Third, the right to be tried by the jury is one of the fundamental constitutional rights granted by the Russian Constitution.<sup>89</sup> This right cannot be abrogated just because the death penalty is no longer applied by the Russian criminal justice system. Fourth, if the government does not recognize the right to jury trials as a fundamental constitutional right, there is a danger of deconstitutionalization of the constitutional provisions by the ordinary laws. This is prohibited by Article 55(2) of the Russian Constitution, which states that “no laws shall be adopted canceling or derogating human rights and freedoms.”<sup>90</sup> Despite all these arguments, the majority of judges in the Constitutional Court allowed the abolition of juries in political trials such as terrorism and espionage.<sup>91</sup> This decision has opened the proverbial Pandora’s Box of anti-jury legislation, which can eventually eliminate the institution of judicial democracy in Russia.

It can be suggested that the next step in reducing the jurisdiction of juries in Russia may be the abolition of jury trials in hate murder cases. In October 2010, members of the Moscow City Duma (Moscow City legislature) introduced a bill to the State Duma (the lower Chamber of the Russian Federal Parliament), which would deprive defendants charged with murder committed with hate motive of their right to jury trial.<sup>92</sup> The authors of the bill proposed the following arguments supporting the exclusion of juries from hate crime cases. First, according to the authors of the bill, hate crime cases are very complex and often involve organized criminality, multiple defendants, and multiple counts.<sup>93</sup> Second, the authors of the draft assert

88. KONSTITUTSIYA ROSSIISKOI FEDERATSII [CONSTITUTION] 1993, art. 32(5) (Russ.).

89. Dissenting Opinion of Justice Gadzhiev, *supra* note 84, at 39.

90. KONSTITUTSIYA ROSSIISKOI FEDERATSII [CONSTITUTION] 1993, art. 55(2) (Russ.).

91. *See, e.g.*, The Ruling of the Russian Federation Constitutional Court of Apr. 19, 2010, *supra* note 75.

92. *See* Zakonoproekt No. 435351-5 o Vnesenii izmenenii v Uголовnyi kodeks Rossiiskoi Federatsii i otdel’nye zakonodatel’nye akty Rossiiskoi Federatsii” [Bill No. 435351-5 on Amendments to Criminal Code of the Russian Federation and other legal acts of the Russian Federation] (October 6, 2010), available at [http://asozd2.duma.gov.ru/main.nsf/\(SpravkaNew\)?OpenAgent&RN=435351-5&02](http://asozd2.duma.gov.ru/main.nsf/(SpravkaNew)?OpenAgent&RN=435351-5&02) (last visited May 30, 2011). While this article was finalized the State Duma rejected the bill on May 11, 2011, available at [http://asozd2.duma.gov.ru/main.nsf/\(SpravkaNew\)?OpenAgent&RN=435351-5&02](http://asozd2.duma.gov.ru/main.nsf/(SpravkaNew)?OpenAgent&RN=435351-5&02) (last visited May 30, 2011). It is noteworthy that the Parliament made this decision two weeks after the jury had reached a guilty verdict in another high profile murder trial of two neo-Nazi skinheads, Nikita Tikhonov and Yevgeniya Khasis, charged with double murder of a human rights lawyer, Stanislav Markelov, and a journalist, Anastasia Baburova. It can be speculated that if the Tikhonov’s jury had reached an acquittal it could have swayed the State Duma to passing the anti-jury bill. Anna Arutunyan, *Guilty verdicts boost crackdown on nationalists*, THE MOSCOW TIMES, May 3, 2011, <http://www.themoscownews.com/society/20110503/188636130.html>.

93. Poiasnitel’naia zapiska k projektu federal’nogo zakona No. 435351-5 [Explanatory Note to the Bill No. 435351-5] available at



that negative attitudes of Russian jurors against members of certain racial, ethnic, and religious groups can prevent delivery of just verdicts.<sup>94</sup> The authors argued that “the emotional state of the Russian population does not allow ensured impartiality of juries in murder cases committed with hate motives against any social group.” Third, the authors suggest that criminal law should be applied on the basis of unified standards of admissibility and authenticity of evidence.<sup>95</sup> Otherwise, they warn that it could cause division of the society on the basis of ethnicity, formation of sub-cultures, and emergence of boundaries for mutual understanding between members of the society. The authors have also expressed their concern that it would aggravate contradictions in the Russian society and reduce the security of Russian citizens.<sup>96</sup> Fourth, the authors of the bill now refer with confidence to the majority decision of the Constitutional Court of April 19, 2010.<sup>97</sup> In particular, authors cite the argument of the majority of the Constitutional Court that “in itself the change in the jurisdiction of juries does not restrict access to justice and does not affect the essence of the right to a lawful court.”<sup>98</sup>

It is interesting to note that the first proposals to abolish jury trials in hate crime cases were made in 2006 after a series of scandalous jury acquittals. The most infamous verdicts included acquittals in cases of the racially motivated murders of a nine-year-old Tajik girl and two foreign students from Congo and Vietnam.<sup>99</sup> These cases were tried in 2006 at the Saint Petersburg City Court and received wide publicity in Russia<sup>100</sup> as well as in reports of international human rights organizations such as Amnesty International.<sup>101</sup> Jury acquittals in these trials were condemned not only by the

[http://asozd2.duma.gov.ru/main.nsf/\(SpravkaNew\)?OpenAgent&RN=435351-5&02](http://asozd2.duma.gov.ru/main.nsf/(SpravkaNew)?OpenAgent&RN=435351-5&02) (last visited May 30, 2011).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*; see *Postanovlenie Konstitutsionnogo Suda RF ot 19 apreliia 2010 g.* [Ruling of Russian Federation Constitutional Court of Apr. 19, 2010, No. 8-P.], (April 19, 2010), 12, available at <http://www.ksrf.ru/Decision/Pages/default.aspx>.

99. All three cases will be examined and analyzed further in this article.

100. See, e.g., Marina Garina, *Kto otvetit za ubiistvo 8-letnei Khurshedy*, IZVESTIYA, Mar. 23, 2006, <http://www.izvestia.ru/investigation/article3091399/>; Liubov' Kholopova, *Ubiistvo rebenka priznali khuliganstvom*, KOMSOMOL'SKAIA PRAVDA, Mar. 30, 2006, <http://www.kp.ru/daily/23682.4/51483/>; Dmitri Marakulin, *Detskii sud*, KOMMERSANT, Nov. 14, 2006, <http://www.kommersant.ru/doc.aspx?fromsearch=1dfeef8d-b731-48b8-959a-696a99f659b0&docid=721304>.

101. AMNESTY INTERNATIONAL, RUSSIAN FEDERATION: VIOLENT RACISM OUT OF CONTROL (2006) <http://www.amnesty.org/en/library/asset/EUR46/022/2006/en/3b1925a5-d432-11dd-8743-d305bea2b2c7/eur460222006en.pdf>.

defeated party, the Office of the Public Prosecutor and journalists, but also by a number of Russian politicians and public figures. For instance, the Governor of St. Petersburg, Valentina Matvienko, made the following statement to the journalists a day after the jury acquittal in the murder trial of Roland Epassak:

I was very upset by yesterday's decision of the jury. I am well informed about pre-trial investigation. The investigators have done a great and professional job, and the guilt of the defendants was absolutely proved. People are not prepared either from the juridical or the legal point of view. The decisions are often based on emotions. These are very bad decisions.<sup>102</sup>

Some jury critics even suggested that hate crimes should be excluded from the jurisdiction of the trial by jury because Russian citizens cannot be impartial adjudicators in cases involving victims from racial and ethnic minorities. For example, the Public Chamber's<sup>103</sup> Commission on Tolerance and Freedom of Conscience made the following statement after the jury acquittal of four youths in the murder case of Roland Epassak:

In Saint-Petersburg the jury have once again acquitted several accused charged with crimes committed on the grounds of racial and ethnic animosity and hatred. Unfortunately, jurors, i.e. ordinary citizens of the Russian society, failed to find and confirm the guilt of the defendants. This means, that a part of our society is xenophobic and intolerant of representatives of minorities and foreigners with the dark colour of the skin. . . . Moreover, jurors for good reasons are in fear for their lives and well-being and safety of their relatives. At present time, the government cannot guarantee their safety. The government, and law enforcement agencies in particular, are responsible for ensuring safety and rights of citizens and other residents of our country. Frequent jury acquittals of defendants charged with offences committed on the basis of racial and ethnic animosity and hatred only prove that, this category of criminal cases should be tried only by highly professional judges in order to prevent errors. This task should be entrusted to the most qualified and specially trained representatives of the Russian judiciary.<sup>104</sup>

102. RIA Novosti, *Matvienko ogorчена resheniem prisiazhnykh po delu ob ubiistve kongoleztsa*, RIAN (July 26, 2006, 1:57 PM), <http://www.rian.ru/incidents/20060726/51856688.html?id>. It should be noted that in both the Russian and the English languages terms *iuridicheskii* (juridical) and *pravovoi* (legal) are synonyms.

103. As mentioned earlier, it was the same organization which appealed to President Medvedev to veto the bill abolishing jury trials in terrorism and espionage cases.

104. Komissiiia po voprosam tolerantnosti i svobody sovesti [The Commission on Issues of Tolerance and Freedom of Conscience], *Zaiavlenie v sviazi s resheniem suda po delu ob ubiistve v Sankt-Peterburge studenta iz Kongo* [Statement Regarding Jury Verdict in Case of Congolese Student Murder in Saint Petersburg] (July 26, 2006), <http://www.oprf.ru/publications/documents/resolutions/1939>.

At the same time, such an abolitionist approach towards jury trials in hate crimes has not been endorsed either by the governing political party “United Russia” (in Russian “Edinaia Rossiia”) or human rights organizations. For example, the leader of the “United Russia” and Speaker of the State Duma, Boris Gryzlov, during his meeting with Saint Petersburg’s Governor Valentina Matvienko in October 2006, said the following:

Law enforcement agencies, and first of all the office of the prosecutors, should draw certain conclusions in this situation. Prosecution should learn how to prove its case in front of the jury. This type of court has its own features, however, I believe it is wrong to raise an issue of inefficiency of trial by jury. A more appropriate issue would be the professionalism of prosecutors in court.<sup>105</sup>

A similar opinion was voiced by Svetlana Gannushkina, a human rights activist and President of the “Civic Assistance Committee,” in response to the Public Chamber’s statement cited above:

Trial by jury educates not only the society, but also the investigative authorities and the prosecution. Jurors should be earnestly convinced in guilt of the defendant. By the way, I do not believe that our society (and its representative sample - jurors) is somehow distinguished in terms of xenophobia. I think, that if in that trial, which the Public Chamber refers to [first trial in the murder case of Roland Epassak], the investigation could prove beyond reasonable doubt that the guilty man was on trial, the jury would agree with the prosecution’s case. It seems that evidence presented by the prosecution was weak. This is the real problem for our justice and not the ‘immaturity of the society.’<sup>106</sup>

An interesting opinion about alleged jury bias in such trials was also expressed by the President of the Moscow City Bar Chamber, Genry Reznik:

The level of xenophobia among ordinary people is not higher than among professional judges, but their independence from the government and the prosecution is significantly higher than the independence of the judiciary. Complaints should be made against the office of the prosecutor, who do not know how to present a case in a real adversarial trial.<sup>107</sup>

These arguments either in favor or against jury trials in hate crimes were not based on serious analysis of jury acquittals in the cases mentioned

105. RIA Novosti, *Gryzlov Prokuratura dolzhna nauchit'sia dokazyvat' obvineniia v sude prisiazhnykh* [The Prosecution Should Learn to Prove Charges in Jury Trials], RIAN (Oct. 26, 2006, 1:36 PM), <http://nw.rian.ru/society/20061026/81500191.html>.

106. Liubov' Sharii, *Rasistskie prestupleniia i sud prisiazhnykh* [Racist Crimes and Trial by Jury], GRANI.RU, (July 28, 2006, 8:06 PM), <http://www.grani.ru/Politics/Russia/m.109334.html>.

107. *Id.*

above. No inquiry commission has been ever organized to investigate these cases. Although some journalists, for example, Leonid Nikitinskii, made attempts to investigate these cases, their analyses did not include a thorough examination of evidence gathered by the police and prosecution and later presented to the actual juries.<sup>108</sup> The present article is probably the first attempt to analyze these four acquittals, which provoked heated debates in Russia regarding the suitability of jury trials for violent hate crimes. The next section explains the methodology used by the author in his research and provides a brief overview of the cases.

### III. METHODOLOGY OF THE STUDY AND OVERVIEW OF THE CASES

Most of the data presented in this study was obtained during the author's research trips to St. Petersburg and Moscow in the fall of 2007. During the trip, the author gathered data on three cases tried by juries in Saint Petersburg City Court (Case 1, Case 2, and Case 3) and the Moscow Provincial Court (Case 4). Some additional data was obtained in 2008 in relation to Case 4, which was re-tried by a jury at the Moscow Provincial Court in 2008. The author relied on two major methods of research. The first method was a review of court transcripts and other materials included in investigative dossiers.<sup>109</sup> The second method of research included in-depth interviews of lawyers, prosecutors, and judges who participated in these trials. The author managed to interview thirteen advocates (ten defense

108. Leonid Nikitinskii, *Ubiitsy ochen' priznatel'ny* [*Murderers are Very Collaborative*], NOVAYA GAZETA, Dec. 14, 2006, available at <http://www.novgaz.ru/data/2006/95/13.html?print=201027070048>; Leonid Nikitinskii, "Osuzhdennye voobshche nikto" [*The Convicted Are Nobody*], NOVAYA GAZETA, Aug. 14, 2006, available at <http://novgaz.ru/data/2006/61/12.html>; Leonid Nikitinskii, *Diaden'ki ne ubivaite* [*Uncles Do Not Kill*], ROS. GAZ., Nov. 13, 2006, available at <http://www.rg.ru/2006/11/13/rassledovanie.html>.

109. Sankt-Peterburgskii Gorodskoi Sud [Saint Petersburg City Court], Ugolovnoe Delo No. 2-109/05 [Criminal Case No. 2-109/05], Protocol sudebnogo zasedaniia [Court transcript] (archive of the Saint Petersburg City Court) (on file with author) [hereinafter Case 1 Transcript]; Sankt-Peterburgskii Gorodskoi Sud [Saint Petersburg City Court], Ugolovnoe Delo No. 2-43/06 [Criminal Case No. 2-43/06], Protocol sudebnogo zasedaniia [Court transcript] (archive of the Saint Petersburg City Court) (on file with author) [hereinafter Case 2 Transcript]; Sankt-Peterburgskii Gorodskoi Sud [Saint Petersburg City Court], Ugolovnoe Delo No. 2-56/06 [Criminal Case No. 2-56/06], Protocol sudebnogo zasedaniia [Court transcript] (archive of the Saint Petersburg City Court) (on file with author) [hereinafter Case 3a Transcript]; Sankt-Peterburgskii Gorodskoi Sud [Saint Petersburg City Court], Ugolovnoe Delo No. 2-29/07 [Criminal Case No. 2-29/07], Protocol sudebnogo zasedaniia [Court transcript] (archive of the Saint Petersburg City Court) (on file with author) [hereinafter Case 3b Transcript]; Moskovskii Oblastnoi Sud [Moscow Province Court], Ugolovnoe Delo No. 2-73-26/07 [Criminal Case No. 2-73-26/07], Protocol sudebnogo zasedaniia [Court transcript] (archive of the Moscow Province Court) (on file with author) [hereinafter Case 4a Transcript]; Moskovskii Oblastnoi Sud [Moscow Province Court], Ugolovnoe Delo No. 2-131-50/07 [Criminal Case No. 2-131-50/07], Protocol sudebnogo zasedaniia [Court transcript] (archive of the Moscow Province Court) (on file with author) [hereinafter Case 4b Transcript].

attorneys and three lawyers who represented victim's families),<sup>110</sup> four prosecutors,<sup>111</sup> and four judges<sup>112</sup> who participated in these cases.

Three of the examined cases resulted in acquittals of all the defendants charged with racially motivated murders. One of the four cases resulted in acquittal of the four defendants during the first trial. However, in that case, the Supreme Court quashed the acquittal, and the new jury convicted all of the defendants. By December 2010, all the cases had gone through the appeal process, and the verdicts had come into force. The parties have thus exhausted all possibilities to appeal the court judgments. The paragraphs below provide a short overview and chronology of the cases.

### A. Case 1

On the evening of February 9, 2004, an eight-year-old Tajik (or according to some sources Uzbek<sup>113</sup>) girl named Khursheda Sultonova was brutally killed in Saint Petersburg.<sup>114</sup> She, her father, and her nine-year-old male cousin were attacked by a group of men in the yard of their apartment block.<sup>115</sup> While the father and the cousin were not seriously injured, the girl was stabbed seven times in the arms, chest, and stomach and died from

110. Interview with N.K., Advocate of the Saint Petersburg Bar, in Saint Petersburg, Russ. (Oct. 16, 2007); Interview with S.P., Advocate of the Saint Petersburg Bar, in Saint Petersburg, Russ. (Oct. 16, 2007); Interview with A.Akh., Advocate of the Saint Petersburg Bar, in Saint Petersburg, Russ. (Oct. 17, 2007); Interview with A.Ant., Advocate of the Saint Petersburg Bar, in Saint Petersburg, Russ. (Oct. 17, 2007); Interview with V.M., Advocate of the Saint Petersburg Bar, in Saint Petersburg, Russ. (Oct. 17, 2007); Interview with T.D., Advocate of the Saint Petersburg Bar, in Saint Petersburg, Russ. (Oct. 17, 2007); Interview with N.P., Advocate of the Saint Petersburg City Bar, in Saint Petersburg, Russ. (Oct. 18, 2007); Interview with B.A., Advocate of the Saint Petersburg Bar, in Saint Petersburg, Russ. (Oct. 19, 2007); Interview with A.B., Advocate of the Saint Petersburg Bar, in Saint Petersburg, Russ. (Oct. 19, 2007); Interview with S.O., Advocate of the Saint Petersburg City Bar, in Saint Petersburg, Russ. (Oct. 22, 2007); Interview with I.B., Advocate of the Saint Petersburg Bar, in Saint Petersburg, Russ. (Oct. 23, 2007); Interview with S.Ts., Advocate of the Moscow City Bar, in Moscow, Russ. (Nov. 8, 2007); Telephone Interview with M.M., Advocate of the Moscow City Bar (Nov. 19, 2007).

111. Interview with D.M., Prosecutor of the Public Prosecutors Office of Saint Petersburg City, in Saint Petersburg, Russ. (July 30, 2007); Interview with S.K., Prosecutor of the Public Prosecutors Office of the City of Saint Petersburg, in Saint Petersburg, Russ. (Oct. 29, 2007); Interview with T.S., Prosecutor of the Public Prosecutors Office of Saint Petersburg City, in Saint Petersburg, Russ. (Oct. 29, 2007); Interview with S.E., Prosecutor of the Public Prosecutors Office of Saint Petersburg City, in Saint Petersburg, Russ. (Oct. 22, 2007).

112. Interview with I.M., Judge of the Saint Petersburg City Court, in Saint Petersburg, Russ. (Oct. 31, 2007); Interview with V.K., Judge of the Saint Petersburg City Court, in Saint Petersburg, Russ. (Oct. 25, 2007); Interview with T.E. Judge of the Saint Petersburg City Court, in Saint Petersburg, Russ. (Oct. 24, 2007); Interview with A.K., Judge of the Saint Petersburg City Court, in Saint Petersburg, Russ. (Oct. 26, 2007).

113. The fact that the family of the girl was in fact of Uzbek ethnicity was indicated by some advocates interviewed by the author. For example, Interview with A.Akh., *supra* note 110.

114. Case 1 Transcript, *supra* note 109, at hearing on October 24, 2005, Prosecutor's Opening Statement.

115. *Id.* at Hearing on October 28, 2005, Victim's Testimony.

massive hemorrhage before the ambulance car arrived. Eight young males,<sup>116</sup> between fourteen and twenty-one years old at the time of the killing, were charged with hooliganism committed by a group, and the youngest accused was also charged with murder committed with two aggravating elements: (1) murder of a person who is known by the killer to be in a helpless state and (2) murder committed for reason of ethnic, racial, or religious hatred.<sup>117</sup> The jury was selected on October 19, 2005, and the trial was held between October 2005 and March 2006.<sup>118</sup> On March 22, 2006, the jury convicted seven defendants of hooliganism. R.Z. was acquitted on the charge of hooliganism, and R.K. was acquitted of murder of the girl.<sup>119</sup> On March 30, 2006, the seven convicted defendants were sentenced to different terms of imprisonment varying from one and half to four years of imprisonment.<sup>120</sup> The youngest accused, who was acquitted of murder, received the longest term of imprisonment.<sup>121</sup> The prosecution, victim's family, and convicted defendants appealed to the Supreme Court of the Russian Federation, which upheld the verdict of the court on August 10, 2006.<sup>122</sup>

### B. Case 2

On the evening of October 13, 2004, a group of young men attacked Vu Anh Tuan, a twenty-year-old Vietnamese citizen who was an international student at the Saint Petersburg Polytechnic Institute.<sup>123</sup> The victim was beaten and stabbed thirty-seven times and died at the scene of the crime.<sup>124</sup> The state charged thirteen young males, aged between fourteen and eighteen at the time of the killing, with aggravated murder committed by a group of persons, a group of persons under a preliminary conspiracy, or an organized group and for a reason of ethnic, racial, or religious hatred.<sup>125</sup> During its closing argument, however, the prosecution dropped the charges of murder in relation to eight defendants and instead accused them

116. The article does not disclose the names of the defendants, lawyers, judges and prosecutors.

117. UK RF, *supra* note 32, art. 105(2)(c) and art. 105(2)(k).

118. Case 1 Transcript, *supra* note 109.

119. *Id.* at Verdict of the Jury, March 22, 2006.

120. *Id.* at Judgment and Sentence of the Trial Judge, March 30, 2006.

121. *Id.*

122. Kassatsionnoe opredelenie Verkhovnogo Suda Rossiiskoi Federatsii ot 10 avgusta 2006 g. No. 78-006-65 sp [Appellate Decision of the Russian Federation Supreme Court of Aug. 10, 2006, No. 78-006-65 sp] [hereinafter Case 1 Appellate Decision] (on file with author).

123. Case 2 Transcript, *supra* note 109, at Hearing on May 3, 2006, Prosecutor's Opening Statement.

124. *Id.*

125. UK RF, *supra* note 32, at art. 105(2)(g), art. 105(2)(k).

of incitement of hatred with application of violence.<sup>126</sup> The prosecution insisted that the other five defendants should be convicted of murder.<sup>127</sup> The jury was selected on April 20, 2006. On October 16, 2006 (three days after the second anniversary of Tuan's death) the jury delivered its verdict acquitting all the defendants on all counts in relation to the killing of Tuan.<sup>128</sup> The prosecution and the victim's family appealed, but the Supreme Court of the Russian Federation upheld the verdict on March 1, 2007.<sup>129</sup>

### C. Case 3

Four defendants aged between seventeen and twenty-three were charged with aggravated murder of a twenty-nine-year-old Congolese student, Roland Epassak, on September 9, 2005. According to the version of the prosecution A.G., Iu.G., V.O. and A.O., due to their hatred against people of African origin,<sup>130</sup> decided to kill the victim previously unknown to them.<sup>131</sup> For this purpose they developed a plan and divided roles among themselves.<sup>132</sup> During the attack, A.O. picked up a rock and threw it at the victim hitting his head.<sup>133</sup> Then all four defendants started beating the victim with their fists and feet. Finally, A.G. asked V.O. to pass him a knife, the possession of which was known to other members of the group.<sup>134</sup> Then A.G. stabbed the victim at least seven times in the head, neck, and right arm.<sup>135</sup> The attackers ran away when a crowd of people started gathering at the place of the crime.<sup>136</sup> The victim was taken to the hospital where he died four days later. The jury was selected on May 18, 2006. On July 25, 2006, the jury acquitted all four defendants.<sup>137</sup> The prosecution appealed,

126. Case 2 Transcript, *supra* note 109, at Hearing on Sep. 25, 2006, Prosecutor's Closing Argument.

127. *Id.*

128. *Id.* at Jury Verdict, Oct. 16, 2006.

129. Kassatsionnoe opredelenie Verkhovnogo Suda Rossiiskoi Federatsii ot 1 marta 2007 g. No. 78-007-3 sp [Appellate Decision of the Russian Federation Supreme Court of March 1, 2007, No. 78-007-3 sp] [hereinafter Case 2 Appellate Decision] (on file with author).

130. The actual term used by the prosecutor in his opening statement was "people of the Negroid race." It should be noted that the term Negro (*negr*) is used in the Russian common and official language does not have any negative connotation. However, in recent years, due to concerns of political correctness, the use of terms such as African or African American has been more common.

131. Case 3a Transcript, *supra* note 109, at Hearing on May 24, 2006, Prosecutor's Opening Statement.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at Hearing on May 31, 2006, Testimony of Witness T L.

137. *Id.* at Hearing on May 24, 2006, Prosecutor's Opening Statement.

and in November 2006, the Supreme Court of the Russian Federation quashed the verdict and ordered a new trial.<sup>138</sup> The second jury was selected at the end of January 2007 and reached a verdict on June 14, 2007.<sup>139</sup> The second jury reached a guilty verdict in relation to all four defendants. The judge sentenced the defendants to the following terms and types of imprisonment: A.G. was sentenced to fourteen years of imprisonment, Iu.G. to nine years, V.O. to seven years, and A.O. to nine years.<sup>140</sup> The Supreme Court of the Russian Federation upheld the verdict and the sentence in September 2007.<sup>141</sup> In order to make a distinction between two trials in this case, the first trial will be labeled as Case 3a and the second trial as Case 3b.

#### D. Case 4

The accused, a fifteen-year-old Russian boy at the time of the commission of the crime, was charged with murder of Artur Sardaryan, an eighteen-year-old ethnic Armenian boy. The crime was committed on a Moscow electrical train on May 25, 2006.<sup>142</sup> The accused was charged with murder and tried by a judge and jury.<sup>143</sup> The jury was selected on May 22, 2007, and after a short trial, the jurors delivered a not guilty verdict a few days later.<sup>144</sup> The prosecution and the victim's lawyer appealed and the Supreme Court of the Russian Federation which reversed the acquittal and ordered a new trial in September 2007.<sup>145</sup> The second jury was selected on December 11, 2007, and the verdict was delivered on January 25, 2008.<sup>146</sup> Once again the jury acquitted the defendant of murder and the prosecution and the victim's family appealed. This time, however, the Supreme Court

138. Kassatsionnoe opredelenie Verkhovnogo Suda Rossiiskoi Federatsii ot 2 noiabria 2006 g. No. 78-o06-80 sp [Appellate Decision of the Russian Federation Supreme Court of November 2, 2006, No. 78-o06-80 sp] [hereinafter Case 3a Appellate Decision] (on file with author).

139. Case 3b Transcript, *supra* note 109.

140. *Id.* at Judgment and Sentence of the Trial Judge, June 19, 2007.

141. Kassatsionnoe opredelenie Verkhovnogo Suda Rossiiskoi Federatsii ot 13 sentiabria 2007 g. No. 78-o07-50 sp [Appellate Decision of the Russian Federation Supreme Court of September 13, 2007, No. 78-o07-50 sp] [hereinafter Case 3b Appellate Decision] (on file with author).

142. Case 4a Transcript, *supra* note 109, at Hearing May 28, 2007, Prosecutor's Closing Arguments.

143. *Id.*

144. *Id.* at Hearings May 22–29, 2007.

145. Kassatsionnoe opredelenie Verkhovnogo Suda Rossiiskoi Federatsii ot 25 sentiabria 2007 g. No. 4-007-82 sp [Appellate Decision of the Russian Federation Supreme Court of September 25, 2007, No. 4-007-82 sp] [hereinafter Case 4a Appellate Decision] (on file with author).

146. Case 4b Transcript, *supra* note 109, Hearings on Dec. 11, 2007–Jan. 25, 2008.



upheld the acquittal on April 7, 2008.<sup>147</sup> As in Case 3, the first trial in this case is classified as Case 4a and the second trial as Case 4b.

#### IV. JURY SELECTION AND COMPOSITION

This section examines the process of selection of jurors for each trial. In particular, it explores how parties used their right to question potential jurors to detect potential bias and challenge jurors for cause and peremptorily in order to select an impartial jury.

According to the Russian criminal procedure legislation, prospective jurors are summoned for each case from the jury lists based on the electoral rolls.<sup>148</sup> The Russian legislation also requires court personnel to summon prospective jurors from jury lists using the method of random selection.<sup>149</sup> The legislation does not stipulate the exact or maximum number of potential jurors that have to be summoned for each trial, but it does require a minimum of twenty candidates.<sup>150</sup> It is the task of the judge to decide on the number of potential candidates for jury selection in each case.<sup>151</sup> Some of the factors that can influence the judge's decision in this matter include the pre-trial publicity of the case, the estimated length of the trial, the number of alternates that the judge wants to select,<sup>152</sup> and the time of the year.<sup>153</sup>

The number of potential jurors who appeared in the cases examined in this study varied from 36 to 113 candidates.<sup>154</sup> As stipulated by law, after a

147. Kassatsionnoe opredelenie Verkhovnogo Suda Rossiiskoi Federatsii ot 7 apreliia 2008 g. No. 4-o08-19 sp [Appellate Decision of the Russian Federation Supreme Court of April 7, 2008, No. 4-o08-19 sp] [hereinafter Case 4b Appellate Decision] (on file with author).

148. Ugolovno-Protsessual'nyi Kodeks Rossiiskoi Federatsii [UPK RF] [Criminal Procedure Code], art. 325 (Russ.).

149. *Id.* at art. 326(1).

150. *Id.* at art. 325(4).

151. *Id.* at art. 326(1).

152. In addition to twelve jurors in each jury the court selected a certain number of alternates. There were 6 alternates in Case 1; 10 – in Case 2; 8 – in Case 3a; 10 – in Case 3b; 4 – in Case 4a and 11 – in Case 4b. Jury Selection, Case 1 Transcript, *supra* note 109, Hearing on Oct. 19, 2005; Case 2 Transcript, *supra* note 109, Hearing on April 18, 2006, Jury Selection; Case 3a Transcript, *supra* note 109, Hearing on May 18, 2006, Jury Selection; Case 3b Transcript, *supra* note 109, Hearing on Jan. 30, 2007, Jury Selection; Case 4a Transcript, *supra* note 109, Hearing on May 22, 2006, Jury Selection; Case 4b Transcript, *supra* note 109, Hearing on Dec. 11, 2007, Jury Selection.

153. For example, if the trial is scheduled for the summer period, many potential jurors would be more reluctant to serve due to the vacation season.

154. There were the following number of candidates who appeared in these cases: Case 1 – 79 candidates; Case 2 – initially, there were 64 candidates, but the court excused the vast majority of them due to different reasons and the court summoned more candidates for a different date and for the second time there were 113 candidates; Case 3a – 83; Case 3b – 71; Case 4a – 36; Case 4b – 38. Case 1 Transcript, *supra* note 109, Hearing on Oct. 19, 2005, Jury Selection; Case 2 Transcript, *supra* note 109, Hearing on April 18, 2006, Jury Selection; Case 3a Transcript, *supra* note 109, Hearing on May 18,

brief introduction for potential jurors, the trial judge starts *voir dire*, asking general questions to verify if the candidates are qualified to serve as jurors.<sup>155</sup> In all six trials, judges asked general questions regarding the age of the candidates, their ability to speak and understand the Russian language, their mental and physical conditions, which can prevent them from serving as jurors, their previous participation in the administration of justice as jurors during the same calendar year, and their criminal record.<sup>156</sup> In addition to these questions, judges asked questions to identify reasons for requests to excuse prospective jurors from the jury service, such as childcare issues, family hardship, work responsibilities, and any other reasons that the judge can determine as compelling grounds for the excuse.<sup>157</sup> Although the Russian law does not automatically disqualify officials associated with the criminal justice system, such as judges, prosecutors, and law enforcement agents, from jury service, these professionals can be excluded from jury lists if they apply for excusal.<sup>158</sup> This potentially allows criminal justice professionals to be selected as candidates and eventually included on the jury unless they are excused by the judge or challenged by the parties. In the trials examined for this study, judges or parties did not consistently ask the candidates about their professional background in the criminal justice system.<sup>159</sup> The matter of religious and moral views, which can prevent candidates from delivering a just verdict, was raised by judges in all trials.<sup>160</sup> In two trials several candidates indicated that they either “had no

2006, Jury Selection; Case 3b Transcript, *supra* note 109, Hearing on Jan. 30, 2007, Jury Selection; Case 4a Transcript, *supra* note 109, Hearing on May 22, 2006, Jury Selection; Case 4b Transcript, *supra* note 109, Hearing on Dec. 11, 2007, Jury Selection.

155. UPK RF, *supra* note 148, art. 328.

156. Case 1 Transcript, *supra* note 109, Hearing on Oct. 19, 2005, Jury Selection; Case 2 Transcript, *supra* note 109, Hearing on April 18, 2006, Jury Selection; Case 3a Transcript, *supra* note 109, Hearing on May 18, 2006, Jury Selection; Case 3b Transcript, *supra* note 109, Hearing on Jan. 30, 2007, Jury Selection; Case 4a Transcript, *supra* note 109, Hearing on May 22, 2006, Jury Selection; Case 4b Transcript, *supra* note 109, Hearing on Dec. 11, 2007, Jury Selection.

157. *Id.*

158. Federal'nyi Zakon RF o Prisiazhnykh Zasedateliakh Federal'nykh Sudov Obshechi Iurisdiktsii v Rossiiskoi Federatsii [Federal Law of the Russian Federation on Jurors in Federal Courts of the General Jurisdiction] ot 20 avgusta 2004 g [adopted Aug. 20, 2004] [hereinafter Federal Law on Jurors], No. 113-FZ (Dec. 29, 2010), art. 7, available at <http://base.garant.ru/12136631/>.

159. Case 1 Transcript, *supra* note 109, Hearing on Oct. 19, 2005, Jury Selection; Case 2 Transcript, *supra* note 109, Hearing on April 18, 2006, Jury Selection; Case 3a Transcript, *supra* note 109, Hearing on May 18, 2006, Jury Selection; Case 3b Transcript, *supra* note 109, Hearing on Jan. 30, 2007, Jury Selection; Case 4a Transcript, *supra* note 109, Hearing on May 22, 2006, Jury Selection; Case 4b Transcript, *supra* note 109, Hearing on Dec. 11, 2007, Jury Selection.

160. *Id.*

right to decide the fate of another person” or “cannot judge kids” or “cannot judge anyone” or “morally cannot be a judge.”<sup>161</sup>

Another set of questions asked by judges during *voir dire* aims to establish some type of prejudice. Using Vidmar’s typology, which describes four types of prejudice: interest prejudice, specific prejudice, generic or general prejudice, and conformity prejudice,<sup>162</sup> it was observed that judges ask questions to identify the first three types of prejudice.<sup>163</sup> For example, in order to establish potential interest and specific prejudice the trial judges, in almost all trials (with the exception of Case 4b), judges asked candidates whether any of them were acquainted with the judge, prosecutors, defense attorneys, accused, or court clerk.<sup>164</sup> Another question that judges asked to detect potential specific prejudice involved pre-trial exposure of jurors to information relevant to the case, including media reports.<sup>165</sup> The fact that jurors had information about the case before the trial did not automatically exclude jurors who had such knowledge. The decisive factors were the degree of the pre-trial exposure and the amount of information known. For example, in Case 2, on the morning of the day when the jury selection was scheduled, a TV Channel showed a brief report discussing jury trials and mentioned that jury selection would take place in Saint Petersburg City Court.<sup>166</sup> During *voir dire*, Juror 31 provided the following information regarding his pre-trial knowledge of the case:

This morning it was said in a TV program “Good morning” that there is a jury selection in the City Court today. . . . There are many people like me today in the courtroom. But this statement in the news did not affect our impartiality in any way. The report did not describe the case itself.<sup>167</sup>

161. Case 2 Transcript, *supra* note 109, Hearing on April 18, Jury Selection; Case 4a Transcript, *supra* note 109, Hearing on May 22, 2006, Jury Selection.

162. Neil Vidmar, *A Historical and Comparative Perspective on the Common Law Jury*, in *WORLD JURY SYSTEMS* 1, 32–33 (Neil Vidmar ed., 2000). According to Vidmar’s typology, interest prejudice “involves instances in which a juror may have a direct stake, or the appearance of a stake, in the outcome of the case.” Specific prejudice “involves attitudes and beliefs about the particular case or the parties that could potentially cause the juror to be incapable of deciding the case with an impartial mind.” Generic prejudice involves the transferring of bias as a result of juror stereotyping of the defendant, victims, witnesses, or the nature of the crime itself.” Conformity prejudice “arises when the case of significant interest to the community such that a juror may perceive that there is a strong public consensus about the case and the proper outcome.”

163. Case 1 Transcript, *supra* note 109, Hearing on Oct. 19, 2005, Jury Selection; Case 2 Transcript, *supra* note 109, Hearing on April 18, 2006, Jury Selection; Case 3a Transcript, *supra* note 109, Hearing on May 18, 2006, Jury Selection; Case 3b Transcript, *supra* note 109, Hearing on Jan. 30, 2007, Jury Selection; Case 4a Transcript, *supra* note 109, Hearing on May 22, 2006, Jury Selection; Case 4b Transcript, *supra* note 109, Hearing on Dec. 11, 2007, Jury Selection.

164. *Id.*

165. *Id.*

166. Case 2 Transcript, *supra* note 109, Hearing on April 18, 2006, Jury Selection.

167. *Id.*

The judge decided not to exclude the juror and parties did not object. It seems that the answer of Juror 31 provided sufficient explanation since the judge did not ask other jurors about their perception of the TV report.

Some jurors indicated either implicitly or explicitly their specific or generic prejudice against the accused during the discussion of other reasons for their excuse. This happened with at least five candidates in Case 2.<sup>168</sup> They provided such comments as “having a four-year-old child I fear for his safety since some of them [defendants] are on bail,” “I don’t want to have any troubles for my family because of this case,” “I do not want to participate,” “Many of them [defendants] are not detained, they can do anything,” “Perhaps, I cannot be impartial because my child, who is not Russian, has been attacked on this [hate] ground,” “I am afraid for my daughter who is the same age as the defendants,” and “Since I have a not very common last name it would be easy for them to trace our town in databases [for example, telephone books]. Moreover I believe that nationalism should be severely punished.”<sup>169</sup> In Case 3a, one of the jurors applied to be excused because he was against xenophobia and could not be impartial towards those who commit such crimes.<sup>170</sup>

Occasionally, candidates volunteered information about their generic bias against victims. For instance in Case 2, one candidate applied to be excused claiming that he cannot be impartial due to his recent squabbles (*stychka*) with Arab and Vietnamese people.<sup>171</sup> The candidate was excused.<sup>172</sup> In Case 1, a candidate expressed doubts that she can be an impartial juror because of her ethnic prejudices.<sup>173</sup> Despite the motion from the defense not to grant the excuse, the judge dismissed this candidate.<sup>174</sup> In Case 4a, a candidate made the following statement: “I cannot be impartial. I believe that people from the Caucasus (the victim in this case was Armenian) have defiant behavior and for this reason I think that the defendant is not guilty.”<sup>175</sup>

Other questions asked by judges to identify jurors who may have anti-prosecution or anti-defense generic prejudice included: whether candidates or their relatives were victims of a crime; whether candidates have close relatives working in the criminal justice system; or whether candidates

168. *Id.*

169. *Id.*

170. Case 3a Transcript, *supra* note 109, Hearing on May 18, 2006, Jury Selection.

171. Case 2 Transcript, *supra* note 109, Hearing on April 18, 2006, Jury Selection.

172. *Id.*

173. Case 1 Transcript, *supra* note 109, Hearing on Oct. 19, 2005, Jury Selection.

174. *Id.*

175. Case 4a Transcript, *supra* note 109, Hearing on May 22, 2006, Jury Selection.

themselves or their relatives were charged with any crime.<sup>176</sup> Those candidates who answered these general questions in the affirmative were then requested one by one to approach the desk of the judge along with the prosecution and the defense to answer further questions.<sup>177</sup> There the candidate was asked whether the facts in his background could affect his ability to be impartial.<sup>178</sup> The court almost always granted the application to be excused when candidates suggested that they could not be impartial jurors. On the other hand, in cases when candidates claimed that relevant facts in their background would not affect their impartiality, judges allowed them to stay in the jury pool.<sup>179</sup>

The parties were also given the opportunity to ask their own questions during *voir dire*. In almost all trials the prosecution was more active in questioning jurors about their potential prejudices. In Case 1, the prosecutor asked candidates to raise their hand if they had negative attitudes towards members of other ethnic groups.<sup>180</sup> In Case 2, the prosecution asked candidates whether any of them have prejudices against persons of other ethnic groups.<sup>181</sup> In Case 3a, the prosecutor asked candidates whether any of them had prejudice against persons of other races and ethnicities and whether such prejudice may prevent them from evaluating the evidence objectively.<sup>182</sup> In Case 3b, another prosecutor phrased her question slightly differently: "The victim in this case was a foreign citizen. Is there anyone among you who has prejudices against foreign citizens living in the territory of the Russian Federation and would this prevent you from being objective?"<sup>183</sup> The prosecutor in Case 4a asked candidates whether any of them or their relatives were members of the RNU<sup>184</sup> and whether anyone had prejudice against people of Caucasus ethnic groups.<sup>185</sup> In Case 4b the same prosecutor asked more broader questions: "Does any of you have nationa-

176. Case 1 Transcript, *supra* note 109, Hearing on Oct. 19, 2005, Jury Selection; Case 2 Transcript, *supra* note 109, Hearing on April 18, 2006, Jury Selection; Case 3a Transcript, *supra* note 109, Hearing on May 18, 2006, Jury Selection; Case 3b Transcript, *supra* note 109, Hearing on Jan. 30, 2007, Jury Selection; Case 4a Transcript, *supra* note 109, Hearing on May 22, 2006, Jury Selection; Case 4b Transcript, *supra* note 109, Hearing on Dec. 11, 2007, Jury Selection.

177. *Id.*

178. *Id.*

179. *Id.*

180. Case 1 Transcript, *supra* note 109, Hearing on Oct. 19, 2005, Jury Selection.

181. Case 2 Transcript, *supra* note 109, Hearing on April 18, 2006, Jury Selection.

182. Case 3a Transcript, *supra* note 109, Hearing on May 18, 2006, Jury Selection.

183. Case 3b Transcript, *supra* note 109, Hearing on Jan. 30, 2007, Jury Selection.

184. See, e.g., STEPHEN D. SHENFIELD, RUSSIAN FASCISM: TRADITIONS, TENDENCIES, MOVEMENTS 113-189 (2001). (The RNU or the Russian National Unity (*Russkoe natsional'noe edinstvo*) is a Russian right-wing political party and paramilitary organization founded in 1990).

185. Case 4a Transcript, *supra* note 109, Hearing on May 22, 2006, Jury Selection.

listic views? Are you or your relatives members of the RNU or any other organization of this kind? Do you have prejudices against non-Slavic people?”<sup>186</sup> None of the candidates in any of the cases acknowledged the existence of such bias. The fact that nobody, except those who informed the court and the parties of their prejudices earlier during the *voir dire*, admitted that he or she had racial or ethnic biases can be interpreted in different ways. On the one hand, it can be suggested that those who remained in the jury pool did not have any prejudice against foreign citizens, people of other races and ethnic groups. On the other hand, it can be argued that questions put to jurors by prosecutors could not detect juror biases. Indeed, despite differences in prosecutors’ questions, they were very straightforward and essentially required candidates to confess that they were either racists or nationalists. The prosecution could test the impartiality of candidates through indirect questions of potential jurors’ opinions about foreign citizens’ and ethnic and racial minorities’ propensity to commit certain crimes or to lie in comparison to Russian people.<sup>187</sup>

Another question, which the prosecution asked in Case 2, Case 3a, Case 3b, and Case 4a, was whether candidates had teenage children and, if so, whether this fact could affect their impartiality.<sup>188</sup> In the majority of cases, candidates who had teenage children claimed that it would not influence their objectivity, but in several cases, candidates—especially those who had daughters—expressed the opinion that this fact could affect their impartiality.<sup>189</sup> As a result, those who expressed doubts about their impartiality were successfully challenged by the prosecution for cause. As one of the prosecutors explained during an interview with the author, the purpose of this question was to identify jurors who might be sympathetic towards teenage defendants and use this information for peremptory challenges or challenges for cause.<sup>190</sup> The prosecutor suggested that all candidates who had children of the same age as defendants in such trials should be excluded. The prosecutor indicated that he observed such sympathy among some jurors based on their reaction during the trials.<sup>191</sup>

186. Case 4b Transcript, *supra* note 109, Hearing on Dec. 11, 2007, Jury Selection.

187. Similar questions were allowed to be asked by the Canadian Supreme Court during jury selection for the trial of an African-Canadian man. *See, e.g., Mankwe v. The Queen*, [2001] 3 S.C.R. 3.

188. Case 2 Transcript, *supra* note 109, Hearing on April 18, 2006, Jury Selection; Case 3a Transcript, *supra* note 109, Hearing on May 18, 2006, Jury Selection; Case 3b Transcript, *supra* note 109, Hearing on Jan. 30, 2007, Jury Selection; Case 4a Transcript, *supra* note 109, Hearing on May 22, 2006, Jury Selection.

189. *Id.*

190. Interview with D.M., *supra* note 111.

191. *Id.*

In Case 3b, the prosecutor challenged for cause two potential jurors who had twenty-two-year-old and twenty-year-old sons. Although one of the jurors asserted that the fact that he had a twenty-two-year-old son would not affect his objectivity, the challenge was granted.<sup>192</sup> Another candidate expressed a slight doubt saying the following: "I think it would not affect my objectivity, but I am not sure."<sup>193</sup> Moreover, during *voir dire* this candidate also mentioned that her father was convicted for hooliganism more than ten years earlier.<sup>194</sup> In Case 2, the prosecution challenged peremptorily a female juror who had a sixteen-year-old grandson.<sup>195</sup> It is not clear whether it was the only motive of the prosecution.<sup>196</sup>

Although, there were several candidates who had teenage children in Case 4a, none of them was challenged by the prosecution.<sup>197</sup>

The defense was less active during *voir dire* in all cases. In Case 1, seven of nine defense attorneys did not ask a single question during *voir dire*.<sup>198</sup> Two other defense attorneys limited their questioning to inquiries regarding age and health of some more mature jurors.<sup>199</sup> In Case 3a, one of the defense attorneys asked three questions: whether any of the candidates believed that there were offenders who were predisposed to commit offenses; whether any of the candidates would trust law enforcement officers only because they work in such agencies; and whether any of the candidates support death penalty.<sup>200</sup> None of the candidates answered these questions in the affirmative, and the defense did not challenge anyone.<sup>201</sup>

In Case 3b, the defense did not question potential jurors and did not challenge any of them either for cause or peremptorily.<sup>202</sup> It seems that it was a tactical decision aimed at winning the sympathy of the jurors. During the trial in Case 3b, one of the defense attorneys publicly announced the position of the defense: "The defense does not challenge anyone. We believe that all people who gathered here are respectable (*dobroporiadochnye*) citizens whom we trust to serve as jurors."<sup>203</sup>

192. Case 3b Transcript, *supra* note 109, Hearing on Jan. 30, 2007, Jury Selection.

193. *Id.*

194. *Id.*

195. Case 2 Transcript, *supra* note 109, Hearing on April 18, 2006, Jury Selection.

196. *Id.*

197. Case 4a Transcript, *supra* note 109, Hearing on May 22, 2006, Jury Selection.

198. Case 1 Transcript, *supra* note 109, Hearing on Oct. 19, 2005, Jury Selection.

199. *Id.*

200. Case 3a Transcript, *supra* note 109, Hearing on May 18, 2006, Jury Selection.

201. *Id.*

202. Case 3b Transcript, *supra* note 109, Hearing on Jan. 30, 2007, Jury Selection.

203. *Id.*

In Case 4a, the defense counsel asked potential jurors one question in relation to general bias: whether any of the candidates had any relatives of Caucasus origin who were assaulted by Russians and, if so, whether it would prevent them from being impartial.<sup>204</sup> None answered this question in the positive.<sup>205</sup> In Case 4b the defense counsel did not ask any questions.<sup>206</sup>

The analysis of court transcripts and interviews with legal professionals who participated in these trials does not indicate that any party was restricted in any way in their ability to ask questions during the *voir dire* or to challenge jurors who might have had prejudice against victims or defendants.<sup>207</sup> Those candidates who expressed doubts about their impartiality were excused or challenged by the prosecution for cause.<sup>208</sup> The prosecution also had an opportunity to challenge candidates without cause and used this power in all trials. As mentioned earlier, the prosecution asked very straightforward questions that did not reveal any prejudice among the candidates. It appears that using written questionnaires with more indirect questions could be more helpful for both parties for this purpose. That said, it should be noted that parties did not voice any concerns regarding the fairness of the selection process either during the trial, at the appeal stage, or during interviews with the author.

In terms of the ethnic composition of juries in these trials, all jurors, with just a few exceptions, had Russian (Slavic) names.<sup>209</sup> The issue of ethnic homogeneity of juries in trials of hate crimes was discussed by the author during interviews with legal professionals who participated in these cases. When asked by the author about their opinion of introducing juries *de medietate linguae*, juries with mixed ethnic composition, which would

204. Case 4a Transcript, *supra* note 109, Hearing on May 22, 2006, Jury Selection.

205. *Id.*

206. Case 4b Transcript, *supra* note 109, Hearing on Dec. 11, 2007, Jury Selection.

207. *E.g.*, Interview with D.M., *supra* note 111; Interview with S.K., *supra* note 111; Interview with T.S., *supra* note 111; Interview with S.E., *supra* note 111.

208. Case 1 Transcript, *supra* note 109, Hearing on Oct. 19, 2005, Jury Selection; Case 2 Transcript, *supra* note 109, Hearing on Apr. 18, 2006, Jury Selection; Case 3a Transcript, *supra* note 109, Hearing on May 18, 2006, Jury Selection; Case 3b Transcript, *supra* note 109, Hearing on Jan. 30, 2007, Jury Selection; Case 4a Transcript, *supra* note 109, Hearing on May 22, 2006, Jury Selection; Case 4b Transcript, *supra* note 109, Hearing on Dec. 11, 2007, Jury Selection.

209. Very rarely jurors had non-Russian last names. There were two jurors with Tatar names in Case 3a and one juror with a Greek last name in Case 3b. None of the jurors in Case 1, Case 2, Case 4a and Case 4b had non-Slavic last names. Case 1 Transcript, *supra* note 109, Hearing on Oct. 19, 2005, Jury Selection; Case 2 Transcript, *supra* note 109, Hearing on Apr. 18, 2006, Jury Selection; Case 3a Transcript, *supra* note 109, Hearing on May 18, 2006, Jury Selection; Case 3b Transcript, *supra* note 109, Hearing on Jan. 30, 2007, Jury Selection; Case 4a Transcript, *supra* note 109, Hearing on May 22, 2006, Jury Selection; Case 4b Transcript, *supra* note 109, Hearing on Dec. 11, 2007, Jury Selection.



include members of the victim's ethnic group,<sup>210</sup> in inter-ethnic hate crimes, the respondents expressed different opinions. On the one hand, several legal practitioners, including prosecutors and judges, rejected the idea. For example, one of the prosecutors mentioned the following:

It would be difficult to put in practice. Members of some of these groups are foreign citizens. This would not result in a discussion of facts and circumstances of the case, but in a clash between representatives of different ethnic groups. Intolerance can emerge in the deliberation room. In some trials, however, I do see representatives of the victim's ethnic group among jurors.<sup>211</sup>

A judge, who participated in the same trial, supported the viewpoint expressed by the prosecutor: "There is no need to introduce it [jury *de medietate linguae*]. I do not feel prejudice among the population of Saint Petersburg. I did not feel any prejudice in this case."<sup>212</sup>

A defense attorney who participated in Case 1 argued that introduction of a jury *de medietate linguae* would violate the basic principle of jury selection—randomness.<sup>213</sup> Another defense attorney who participated in Case 2 indicated that it is the wrong approach: "The crimes should not be divided into general crimes and crimes committed against certain ethnic groups. Crimes are committed against human beings. Otherwise, we would have to agree that crimes against Tatars should be adjudicated only by Tatars, etc."<sup>214</sup>

On the other hand, some legal professionals supported the idea of introducing juries *de medietate linguae*. For instance, one female prosecutor said: "Why not? Every case is unique and every case has its own nuances."<sup>215</sup> Another lawyer who was a representative of the Armenian Diaspora supported the idea even more enthusiastically: "Let it be. It is necessary to include some number of ethnic non-Russians in the jury pool. This number should be proportionate to the number of non-Russians among the general population."<sup>216</sup>

210. See generally on juries *de medietate linguae*, Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985); MARIANNE CONSTABLE, *THE LAW OF THE OTHERS. THE MIXED JURY AND CHANGING CONCEPTIONS OF CITIZENSHIP, LAW AND KNOWLEDGE* (1994); Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury De Medietate Linguae: A History and Proposal for Change*, 74 B.U. L. REV. 777 (1994). For the discussion of applicability of courts *de medietate linguae* for Russia and other post-Soviet countries see KOVALEV, *supra* note 56, at 349–352.

211. Interview with S.K., *supra* note 111.

212. Interview with I.M., *supra* note 112.

213. Interview with B.A., *supra* note 111.

214. Interview with A.B., *supra* note 111.

215. Interview with T.S., *supra* note 111.

216. Interview with S.Ts., *supra* note 110.

Neither the prosecution nor the victims' families<sup>217</sup> in any of the studied trials raised the issue of alleged ethnic bias of juries based on the fact that all jurors were ethnic Russians. According to the Russian law, before jurors are sworn in, either party may request the presiding judge to discharge the entire jury on the grounds of *tendentiousness of composition of jury* (*tendentsioznost' sostava kollegii prisiazhnykh*), which means that a particular jury might be seen as incapable of reaching an impartial verdict due to its characteristics.<sup>218</sup> The presiding judge can sustain or deny such a motion but the judge must provide a rationale for his decision.<sup>219</sup>

In theory, a number of Russian scholars and commentators have provided several examples of cases when the composition of the jury could be considered *tendentious*. According to Pashin, claims of tendentiousness of jury composition are usually made on grounds of gender or ethnic structure of the jury.<sup>220</sup> Another Russian scholar, Petrukhin, argues that a party can make a motion to discharge the jury on grounds of tendentiousness of jury composition if in a trial of an Orthodox Christian the majority of jurors are Muslim.<sup>221</sup>

In reality, however, the success of such a motion to challenge the entire jury is very rare.<sup>222</sup> In some trials defendants attempted to challenge the

217. It should be noted that in the Russian criminal procedure that victims or their families have procedural rights of a party, including the right to participate in jury selection, present evidence, examine witnesses etc. UPK RF, *supra* note 148, art. 42. In Case 1, 2, 4a and 4b victims' families were represented by professional lawyers. Case 1 Transcript, *supra* note 109; Case 2 Transcript, *supra* note 109; Case 4a Transcript, *supra* note 109; Case 4b Transcript, *supra* note 109. The Supreme Court of the Russian Federation found that the selection process in the absence of the victim can be a legitimate ground for reversing an acquittal. See Kassatsionnoe opredelenie Verkhovnogo Suda RF ot 12 marta 2008 No. 20-008-7sp [Appellate Decision of the Russian Federation Supreme Court of March 12, 2008, No. 20-008-7sp], available at [http://www.vsrfr.ru/stor\\_pdf.php?id=196294](http://www.vsrfr.ru/stor_pdf.php?id=196294). In *Mamedov*, the victim had been notified about the date and time of the trial 10 hours before the hearing but could not attend the jury selection process and participate in it. The Supreme Court decided that the victim's right to participate in the jury selection was violated and quashed the acquittal.

218. UPK RF, *supra* note 148, art. 330(1).

219. Sergei Pashin, *Otbor prisiazhnykh zasedatelei v sude* [Jury Selection in Court], in SOSTIAZATEL'NOE PRAVOSUDIIE [ADVERSARIAL JUSTICE] 38 (Sergei Pashin and Liudmila Karnozova eds., 1996).

220. *Id.* at 37.

221. Igor Petrukhin, *Sud prisiazhnykh problemy i perspektivy* [Jury trial problems and prospects], 3 GOSUDRASTVO I PRAVO, 5, 9 (2001).

222. For instance, Pashin and Radutnaia refer to a single case, when the defendant was charged with rape and eleven of twelve jurors were women. See Pashin, *supra* note 236, at 37; Nona Radutnaia, *Poriadok razresheniia na predvaritel'nom sledstvii khodataistva o rassmotrenii dela sudom prisiazhnykh. Predvaritel'noe slushanie. Podgotovitel'naia chast' sudebnogo zasedaniia. Formirovanie sostava prisiazhnykh zasedatelei* [Consideration of pre-trial application for a jury trial. Preliminary hearing. Jury selection.], in RASSMOTRENIE DEL SUDOM PRISIAZHNYKH [TRIAL BY JURY] 29, 73 (Viacheslav Lebedev ed., 1998). The most recent case when the jury has been successfully challenged by the prosecutor on ground of the tendentiousness of composition of the jury reported in the trial of ex-mayor of Smolensk in November 2010. Egor Aref'ev, *Kollegiiu prisiazhnykh razognali iz-za simpatii k obvi-*

entire jury on grounds of the religious, gender, and age composition of the jury, but did not succeed. For instance, in the case of *Namazov*, a Muslim defendant of Azeri origin, the defense argued that the composition of the jury was tendentious because there were no Muslim jurors on the jury. The defendant was convicted and appealed. The Russian Supreme Court, however, disagreed with the defense's submission and held that the defense argument was unjustified because the trial court had examined the jury panel for their ability to participate in fact-finding.<sup>223</sup> Moreover, the Supreme Court referred to the equality clause of the Russian Constitution.<sup>224</sup> In other words, the Russian Supreme Court claimed that the Constitutional declaration was fully enforced in Russia, and all juries would fulfil the equality clause regardless of a particular jury's composition.

In the case of *Tarasov, Bal' & Repnikov*, the defendants, ethnic Russians, were tried by a jury in the Far-Eastern district military court for murder of an ethnic Ingush victim.<sup>225</sup> The prosecution attempted to challenge the all-female jury on the grounds that an ethnically all-Russian female jury could not reach an impartial verdict in a trial of Russian defendants charged with the murder of an ethnic Ingush.<sup>226</sup> In this case, all defendants were acquitted and the prosecution and the victim's relatives appealed to the Russian Supreme Court.<sup>227</sup> The Supreme Court held that the ratio of men and women on juries was not stipulated by law, and jurors were selected without taking into consideration their gender or race.<sup>228</sup>

In the case of *Kumsiev & Kuchiev*, the trial judge refused to grant the prosecution's challenge to the entire jury on the ground that eleven of twelve jurors selected to try the case were of the same ethnicity as the de-

*niaemomu* [Jury was dismissed due to sympathy towards the accused], KOMSOMOL'SKAIA PRAVDA, Nov. 10, 2010, available at <http://www.kp.ru/online/news/773566>.

223. See Kassatsionnoe opredelenie Verkhovnogo Suda RF ot 12 apreliia 2005 g. [Russian Federation Supreme Court Appellate Decision of Apr. 12, 2005], No. 37-005-01sp available at [http://www.vsrfr.ru/stor\\_pdf.php?id=114278](http://www.vsrfr.ru/stor_pdf.php?id=114278).

224. Article 19 of the Russian Constitution states: "All people shall be equal before the law and court. The State shall guarantee the equality of rights and freedoms of citizens, regardless of sex, race, nationality, language, origin, property and official status, place of residence, religion, convictions membership of public associations, and any other circumstances." KONSTITUTSIIA ROSSIISKOI FEDERATSII [CONSTITUTION] 1993, art. 19 (Russ.).

225. The Ingush people are closely related to the Chechens and speak a similar language, belonging to the Vaynakh or North-central Caucasian linguistic family.

226. Kassatsionnoe opredelenie Verkhovnogo Suda RF ot 19 oktiabria 2004 g. No. 2-054/02 [Russian Federation Supreme Court Appellate Decision of October 19, 2004, No. 2-054/02] (on file with author).

227. *Id.*

228. *Id.*

fendant.<sup>229</sup> The Supreme Court, dismissing the appeal by the prosecution of the acquittal, agreed with the trial judge who stated in his separate reasoned ruling that “simple prevalence of one ethnic group over another ethnic group among jurors in the absence of established facts regarding their interests in the outcome of the case is not sufficient for concluding that the composition of the jury is tendentious.”<sup>230</sup> Moreover, the Supreme Court also held that during *voir dire*, parties did not ask questions regarding ethnicity, and the crime with which the defendants were charged did not concern the issue of ethnicity.<sup>231</sup>

On the one hand, it is clear that the Russian Supreme Court, in its appellate decisions, did not find the mere fact of a homogeneous jury in terms of gender, ethnicity, race, or religion, as a sufficient ground for challenging them for their potential bias. On the other hand, however, the Supreme Court did not clarify what grounds can be used by trial courts for discharging the entire jury when a party claims that the structure of the jury is tendentious. In the mandatory guidelines for trial courts, the Plenum of the Supreme Court of the Russian Federation explained that the phrase “tendentiousness of composition of the jury” refers to cases where there are reasons to believe that the jury, which was selected for a particular case, was not able to consider a criminal matter objectively and comprehensively to reach a just verdict because the jurors were homogenous in terms of age, profession, social standing, and other characteristics.<sup>232</sup> It is unclear why the Supreme Court, in its appellate decisions, did not consider homogeneous juries as tendentious in terms of gender, race, or ethnicity, but did recognize homogeneous juries are potentially biased in age, profession, social standing, and other characteristics.

There are at least two possible explanations for this paradox. First, the decisions in the trials of *Namazov* and *Tarasov, Bal' & Repnikov* involved the interests of parties that belonged to ethnic minorities, which indicates that courts of all levels were reluctant to consider issues of racial, religious, and ethnic bias of jurors from racial and ethnic majority groups. Such reluctance may be because perceived difficulties in summoning prospective

229. Kassatsionnoe opredelenie Verkhovnogo Suda RF ot 15 noiabria 2007 g. No. 22-o07-17sp [Russian Federation Supreme Court Appellate Decision of Nov. 15, 2007, No. 22-o07-17sp], available at [http://www.vsrfr.ru/stor\\_pdf.php?id=185720](http://www.vsrfr.ru/stor_pdf.php?id=185720).

230. *Id.*

231. *Id.*

232. Postanovlenie Plenuma Verkhovnogo Suda RF “O primenenii sudami norm Ugolovno-protsessual'nogo kodeksa Rossiiskoi Federatsii, reguliruiushchikh sudoproizvodstvo s uchastiem prirazhnykh zasedatelei” ot 22 noiabria 2005 g. [Russian Federation Supreme Court Plenary Ruling On Application of Criminal Procedure Code in Relation to Jury Trials of Nov. 22, 2005], No. 23, s. 16, available at [http://www.vsrfr.ru/vscourt\\_detale.php?id=2834](http://www.vsrfr.ru/vscourt_detale.php?id=2834).

jurors from the same community as the defendant or the victim in some regions. Second, the decisions in *Namazov* and *Tarasov, Bal' & Repnikov* are not in conflict with the guidelines stipulated in the Resolution of the Supreme Court. In *Namazov* and *Tarasov, Bal' & Repnikov*, the homogeneity of the jury was not a sufficient ground for the trial judge or the appellate court to believe that the juries were tendentious.<sup>233</sup> In other words, according to the Supreme Court judges, the religion of the defendant in *Namazov* and the gender and ethnicity of the victim in *Tarasov, Bal' & Repnikov* and the ethnicity of the defendant in *Kumsiev & Kuchiev* were not significant factors in those cases as opposed to gender in the case of a male defendant charged with rape when eleven of twelve jurors were female.<sup>234</sup> Thus, the Plenum of the Russian Supreme Court failed to clarify certain tests which should be applied in order to establish the tendentiousness of jury composition. This gap causes inconsistencies in decisions made in trial courts. Moreover, as Rustamov has pointed out, it is unclear what proportion of jurors in a jury may constitute a tendentious jury composition.<sup>235</sup>

As mentioned above, the issue of tendentiousness of composition of a jury was not raised during the selection process by any party in any of the trials studied by the author. Therefore, it can be concluded that all the parties were satisfied with the composition of the juries when the trials commenced. However, it is unclear what decision would have been made by the trial judge and the Supreme Court judges, if either the victim or the prosecution had attempted to challenge all-Russian juries in the studied cases. Although the Supreme Court held that juries could not be challenged on the ground of their ethnic homogeneity, the case of *Kumsiev & Kuchiev* implies that this standard applies to cases where ethnicity of the parties is not an issue.<sup>236</sup> Hence, it can be suggested that if the crime concerns issues of ethnicity or race, such as violent interracial crimes, the jury composed solely of members of the same ethnic group as the defendant can be found tendentious.

233. Russian Federation Supreme Court Appellate Decision of Apr. 12, 2005, *supra* note 223; Russian Federation Supreme Court Appellate Decision of October 19, 2004, *supra* note 226.

234. Russian Federation Supreme Court Appellate Decision of Nov. 15, 2007, *supra* note 229.

235. Khasplat Rustamov, *Problema otvoda v sude prisiazhnykh* [The Problem of Jury Challenges], 6 GOS. I PRAVO, 80, 81 (1997).

236. Russian Federation Supreme Court Appellate Decision of Nov. 15, 2007, *supra* note 229.

## V. TRIAL HEARINGS: EVIDENCE, ARGUMENTS OF THE PARTIES AND THEIR BEHAVIOR DURING THE TRIAL

The Russian law guarantees the presumption of innocence and places the onus to prove all elements of the offense on the prosecution.<sup>237</sup> The prosecution had to prove that the defendants caused the death of the victims and that they had the intention to kill the victims with a special motive—hatred against a racial or ethnic group. This section examines the strength of evidence presented by the prosecution to the juries in six studied trials, but also examines the arguments and comments made by the parties and judges to influence the juries.

### A. Incriminating Evidence Against the Defendants

Analysis of the court transcripts and interviews with the parties and judges reveal that prosecutors presented the following types of evidence in all trials: pre-trial incriminating statements made by the accused, testimonies of witnesses, hate literature, and computer files.<sup>238</sup> In one case, the prosecution used a video recording made by the surveillance camera of the actual attack against the victim.<sup>239</sup> In none of the trials did the state present any weapon or DNA evidence linking the accused to the murders.<sup>240</sup>

#### 1. Confessions Made to the Police

Several defendants made self-incriminating pre-trial statements in Case 1, Case 2, and Case 3.<sup>241</sup> The accused in Case 4 never made any self-incriminating statements at any stage of the criminal process.<sup>242</sup> During the trial, however, all the defendants who made incriminating statements, with the exception of one accused in Case 1, recanted their pre-trial statements claiming that the statements had been obtained by the police officers

237. UPK RF, *supra* note 148, art. 14.

238. Case 1 Transcript, *supra* note 109; Case 2 Transcript, *supra* note 109; Case 3a Transcript, *supra* note 109; Case 3b Transcript, *supra* note 109; Case 4a Transcript, *supra* note 109; Case 4b Transcript, *supra* note 109.

239. Case 3a Transcript, *supra* note 109, Hearing on July 5, 2006, Demonstration of Video Recordings to Jurors; Case 3b Transcript, *supra* note 109, Hearing on May 31, 2007, Demonstration of Video Recordings to Jurors.

240. Case 1 Transcript, *supra* note 109; Case 2 Transcript, *supra* note 109; Case 3a Transcript, *supra* note 109; Case 3b Transcript, *supra* note 109; Case 4a Transcript, *supra* note 109; Case 4b Transcript, *supra* note 109.

241. Reading out pre-trial statements of accused. Case 1 Transcript, *supra* note 109, Hearings on Nov. 16, 18, 25; Dec. 2, 2005, and Jan. 16, 2006; Case 2 Transcript, *supra* note 109, Hearing on Sep. 19, 2006; Case 3a Transcript, *supra* note 109, Hearings on June 28 and 29, 2006; Case 3b Transcript, *supra* note 109, Hearings on May 22, 24, and 31, 2007.

242. Case 4a Transcript, *supra* note 109; Case 4b Transcript, *supra* note 109.

through the use of torture and other forms of coercion.<sup>243</sup> Despite the defense motions to exclude pre-trial statements from evidence, trial judges allowed almost all of the statements<sup>244</sup> in all three cases, and the statements were presented to the juries.<sup>245</sup>

Before considering the actual pre-trial statements and attempts to challenge their voluntariness in these cases, it should be noted that the coercive methods applied by the police during interrogations is still one of the biggest defects of many post-Soviet criminal justice systems. Russian judges are very reluctant to exclude confessions as inadmissible due to shortcomings in legislation and their accusatorial bias.<sup>246</sup> Although, in the early years of jury trials in Russia, defense attorneys successfully used the argument of coerced confessions as part of their case—even where trial judges ruled that the confessions were admissible<sup>247</sup>—in the 2000s, the Russian Supreme Court in its appellate decisions and reviews of judicial practice in jury trials held that any references made by a party to the application of torture and other forms of coercion by the police in the presence of juries should be considered as illegitimate pressure on jurors and a legitimate ground for reversal of an acquittal.<sup>248</sup>

This rule of the Russian Supreme Court, however, is not supported by the legislation. It was created by the judiciary to assist in securing jury

243. Case 1 Transcript, *supra* note 109, Hearings on Nov. 16 and 18, 2005, Defendant's Testimony; Defendant's testimony, Case 2 Transcript, *supra* note 109, Hearings on June 15, 26, Defendant's Testimony; Aug. 14 and 15, 2006, Defendant's Testimony; Case 3a Transcript, *supra* note 109, Defendant's Testimony; Case 3b Transcript, *supra* note 109, Defendant's Testimony.

244. The trial judge in Case 2 occasionally excluded, on technical grounds, pre-trial statements given by an accused minor. For example, although Russian criminal procedure law clearly prohibits questioning of the minor suspect or accused for a period of more than two hours without recess, the police record showed that one of the minor defendants was interrogated for more than two and a half hours. UPK RF, *supra* note 148, art. 425(1). The trial judge excluded that minor's statement on the defense's motion. Case 2 Transcript, *supra* note 109, Hearing on June 7, 2006.

245. Reading out pre-trial statements of accused. Case 1 Transcript, *supra* note 109, Hearings on Nov. 16, 18, 25; Dec. 2, 2005 and Jan. 16, 2006; Case 2 Transcript, *supra* note 110, Hearing on Sep. 19, 2006; Case 3a Transcript, *supra* note 110, Hearings on June 28 and 29, 2006; Case 3b Transcript, *supra* note 110, Hearings on May 22, 24 and 31, 2007.

246. See generally KOVALEV, *supra* note 56 at 133–188 (discussing defects in the Russian criminal justice system).

247. See, e.g., Stephen C. Thaman, *The Resurrection of Trial by Jury in Russia*, 31 STAN. J. INT'L L. 61, 92, 105–6 (1995).

248. Obzor praktiki Kassatsionnoi palaty Verkhovnogo Suda RF za 2002 g. po delam rassmotrennym kraevymi i oblastnymi sudami s uchastiem prisiaznykh zasedatelei, para. 4 [Overview of the Russian Federation Supreme Court's Cassational Chamber Practices on Cases with Participation of Jurors of 2002, para. 4] [hereinafter Overview of Practices], available at [http://www.vsrfr.ru/vscourt\\_detale.php?id=170](http://www.vsrfr.ru/vscourt_detale.php?id=170); Kassatsionnoe opredelenie Verkhovnogo Suda RF ot 13 apreliia 2005 g. [Russian Federation Supreme Court Appellate Decision of Apr. 13, 2005], No. 81-O05-26 sp, available at [http://www.vsrfr.ru/stor\\_pdf.php?id=118714](http://www.vsrfr.ru/stor_pdf.php?id=118714); Kassatsionnoe oprdelenie Verkhovnogo Suda RF ot 22 dekabria 2005 g. [Russian Federation Supreme Court Appellate Decision of Dec. 22, 2005], No. 4-o05-159sp, available at [http://www.vsrfr.ru/stor\\_pdf.php?id=133140](http://www.vsrfr.ru/stor_pdf.php?id=133140).

convictions by admitting confessions and discouraging the defense from attacking the prosecution's case—or at least allowing the prosecution to appeal against jury acquittals if the defense attempted to argue that the confession was obtained by oppression. Although the Russian Criminal Procedure Code prohibits parties from telling the jury about inadmissible evidence excluded by the trial judge,<sup>249</sup> the Code does not prohibit the defense from challenging the reliability of a pre-trial statement of the accused presented by the prosecution as evidence of guilt. In other words, by not allowing the defense to attack the reliability of a confession, the Russian Supreme Court deprives defendants of their right to defend themselves by resorting to “all ways and means, not prohibited by the Code.”<sup>250</sup> In particular, the Supreme Court deprives the defendant of the opportunity to explain to jurors the reasons for changing his position by pleading not guilty in court. This position of the Russian Supreme Court is entirely different from the jury systems in the United Kingdom and United States.<sup>251</sup>

Even if the Russian Criminal Procedure Code is amended in accordance with the rule established by the highest appellate court of the Russian Federation, there is a danger that this approach would contradict the international human rights standards and treaties signed by Russia. As Lord Rodger of Earlsferry pointed out in the House of Lords decision in *R. v. Mushtaq*, permission to rely upon the confession, which is disputed by the defense, would be “an invitation to the jury to act in a way that was incompatible” with the right of the accused “against self-incrimination under Article 6(1) of the European Convention on Human Rights.”<sup>252</sup>

Another important aspect is the actual confessions by the accused and attempts to challenge their voluntariness and reliability by the defense. As mentioned above, some accused in all cases, except Case 4a and Case 4b, confessed before the trial that they had participated in crimes with which they were charged.<sup>253</sup> The analysis of court transcripts and interviews with defense attorneys indicate that these statements could have been obtained under physical coercion, threats, or trickery.

249. UPK RF, *supra* note 148, art. 235(6).

250. *Id.* at art. 16(2).

251. See, e.g., *Wilson v. United States*, 162 U.S. 613, 624 (1896); *R. v. Mushtaq*, [2005] UKHL 25, [2005] 1 W.L.R. 1513 (H.L.) (appeal taken from Eng.).

252. *Mushtaq*, at ¶53; See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter *European Convention*], art. 6(3)(c), available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.

253. Case 1 Transcript, *supra* note 109, Hearings on Nov. 16, 18, 25; Dec. 2, 2005 and Jan. 16, 2006; Case 2 Transcript, *supra* note 109, Hearing on Sep. 19, 2006; Case 3a Transcript, *supra* note 109, Hearings on June 28 and 29, 2006; Case 3b Transcript, *supra* note 109, Hearings on May 22, 24 and 31, 2007.



First, in Case 1, one of the accused, K.P., started giving incriminating statements against himself and his co-defendants shortly after the police confronted him with a piece of evidence—some blood stains police found on his jeans.<sup>254</sup> Even though the forensic examination did not confirm that it was the victim's blood in the stains, K.P. was initially charged with murder.<sup>255</sup> According to several defense attorneys and the attorney who represented the victim's family in this case, in order to avoid the possibility of conviction for murder K.P. decided to cooperate with the police and gave incriminating statements against his co-defendants who were charged with hooliganism in this case.<sup>256</sup> K.P. also gave a statement stating that he saw one of the accused, R.K., actually stab the victim in the stomach.<sup>257</sup> In the end, K.P. was the only defendant who did not recant his pre-trial statements during the trial.<sup>258</sup>

Second, several defendants in all cases—with the exception of Cases 4a and 4b—told their attorneys and the court that the police had forced them to confess by threats and physical coercion.<sup>259</sup> For instance, the defendant A.G. in Case 1 said that the police told him that if he did not confess they would allow ethnic Tajik inmates to deal with him and his co-defendants for killing the victim (the Tajik girl).<sup>260</sup> His co-defendant, D.P., testified in the absence of the jury that the police officers told him that if he did not confess “they would shove a soldering iron in his anus” and “put him in the basement with rats and nobody will ever find him.”<sup>261</sup> In his letter to the City Prosecutor, D.P. wrote that his cellmate, a man in his fifties, encouraged him to confess.<sup>262</sup> In court, D.P. testified that his cellmate advised him to confess and tell the police that he had been drunk and could not remember anything.<sup>263</sup> After his interrogation, when D.P. refused to give incriminating statements in the presence of his mother and his defense counsel, the same police officers who had threatened him with a soldering

254. Interview with N.P. *supra* note 110; Interview with I.B. , *supra* note 110; Interview with S.P., *supra* note 110.

255. *Id.*

256. *Id.*

257. Case 1 Transcript, *supra* note 110, Trial Judge's Summation to the Jury, at 28.

258. *Id.* at 25.

259. Interview with N.K., *supra* note 110; Interview with S.P., *supra* note 110; Interview with A.Akh., *supra* note 110; Interview with A.Ant., *supra* note 110; Interview with V.M., *supra* note 110; Interview with T.D., *supra* note 110; Interview with B.A., *supra* note 110; Interview with A.B., *supra* note 110; Interview with S.O., *supra* note 110.

260. Interview with S.O., *supra* note 110.

261. Case 1 Transcript, *supra* note 109, Hearing on Dec. 5, 2005.

262. *Id.* (although the letter was included in the materials of the criminal case, the judge did not allow it to be presented to the jury as evidence).

263. *Id.*

iron told him that he would “get it hot,” and they would organize his jail rape.<sup>264</sup>

Another defendant in Case 1, O.U., told the court in the absence of the jury that during the interrogation, police officers slapped him in the face, hit him on the back with their fists, and put a plastic bag with liquid ammonia (*nashatyrnyi spirt*) over his head.<sup>265</sup> With the plastic bag over his head O.U. tried to hold his breath, but one of the police officers hit him in the stomach and he started breathing and his eyes were watering.<sup>266</sup> According to O.U., police officers put the bag on his head at least three times and kept it between 30 and 90 seconds each time.<sup>267</sup> After these acts of violence and threats that the violence would get even worse, O.U. gave incriminating statements against one of the co-defendants and twelve other people who were not even charged with the crime.<sup>268</sup>

In Case 2, the defendant A.D. testified in court outside the presence of the jury that when he was arrested by the police, he was kept against his will in a hotel belonging to police forces on the pretext that the state was protecting him against his co-defendant.<sup>269</sup> According to A.D., during that time he was subjected to even worse conditions than detainees in prison: he was given food only once a day, forced to drink a lot of vodka, and slept on the floor because both beds in the room were occupied by his guards who beat him frequently (once every three days).<sup>270</sup> A.D. also said to the court—again, outside the presence of the jury—that he could not contact anyone or escape because when his guards left the room, they handcuffed him to a heating radiator.<sup>271</sup> Once he was threatened by one of the guards who put a knife against his throat.<sup>272</sup> According to the defendant, these measures were applied to him to make sure that he would not recant the incriminating statements he gave to the police after torture and threats at the police station.<sup>273</sup>

264. It should be noted that if an inmate is raped in jail he becomes an outcast from the prison community, his life is worthless and he can be killed by anyone in prison. Prison rapes orchestrated by law enforcement officers are not uncommon in Russian prisons. See, Sergey Chernov, *Officers Go On Trial for Raping Prisoners*, THE ST. PETERSBURG TIMES, Mar. 9, 2010, available at [http://www.sptimes.ru/index.php?action\\_id=2&story\\_id=30947](http://www.sptimes.ru/index.php?action_id=2&story_id=30947).

265. Case 1 Transcript, *supra* note 109, Hearing on Dec. 5, 2005, Defendant’s Testimony.

266. *Id.* at Hearing on Nov. 21, 2005, Defendant’s Testimony.

267. *Id.*

268. *Id.*

269. Case 2 Transcript, *supra* note 109, Hearing on June. 15, 2006, Defendant’s Testimony.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

Moreover, having obtained A.D.'s incriminating statements, the police officers managed to obtain confessions from other suspects. For example, S.F., another defendant in Case 2, testified in court outside the presence of the jury that when he was arrested on the street and delivered to the police station, police officers urged him to confess.<sup>274</sup> When he claimed his innocence and refused to confess, police officers handcuffed him to the heating radiator and started beating him.<sup>275</sup> After the beating, they told him that he would confess anyway when they put him in a cell with "blacks" who could do anything they wanted with him.<sup>276</sup> At the police station, officers let A.D. and S.F. alone for several minutes, and A.D. advised S.F. to give and sign any statement that the officers require because if he did not do it, the police would force him to give the statement eventually.<sup>277</sup> A.D. also told his co-defendant that, although he was also innocent and had not participated in the killing of the victim, the police had obtained his confession by torture and would do the same to S.F.<sup>278</sup>

In Case 3a, two defendants claimed that they were tortured. For example, A.G. described how he was tortured in the police station:

They put me in the center of the room and asked to say how everything had happened. I told them I knew nothing. Then they tied my hands and feet together and hung me on the pole between two tables. I began to shout that I knew nothing. There was also a woman there who helped me to work out my hands because I did not feel them, they became numb.<sup>279</sup>

The fact of A.G.'s torture has been confirmed by his co-defendant and several other witnesses who were detained by the police along with A.G., but later released without charge.<sup>280</sup> During the preliminary hearing they testified that at the police station they heard A.G. crying in another room "it hurts, leave me alone"<sup>281</sup> and that saying that he had not killed and had not beaten the victim.<sup>282</sup> These witnesses testified that they had seen A.G. shortly after he shouted. According to the witnesses, A.G. looked pale

274. *Id.* at Hearing on June 26, 2006, Defendant's Testimony.

275. *Id.*

276. *Id.* The term "blacks" here indicates any inmate belonging to a non-Russian ethnic group.

277. *Id.*

278. *Id.*

279. Case 3a Transcript, *supra* note 109, Preliminary Hearings on Apr. 18, 2006, Defendant's Testimony. The method of torture described by the defendant in this case is similar to the methods of suspension and trussing mentioned in the Human Right Watch report about police torture in Russia. *See generally* HUMAN RIGHTS WATCH, CONFESSIONS AT ANY COST. POLICE TORTURE IN RUSSIA (Nov. 1999), available at <http://www.hrw.org/legacy/reports/1999/russia/>.

280. Case 3a Transcript, *supra* note 109, Preliminary Hearings on Apr. 25, 2006, Witnesses' Testimony.

281. *Id.*

282. *Id.*

and frightened.<sup>283</sup> None of these witnesses was allowed to testify before the jury regarding these allegations.<sup>284</sup>

Another defendant in Case 3a, A.O., said during his direct examination in response to a question from his lawyer regarding contradictions between his pre-trial statements and testimony in court that during police interrogations, he was confused and did not care what he had to say or write and would have “confess[ed] to the crucifixion of Jesus Christ.”<sup>285</sup>

Third, several defendants in Case 1 gave self-incriminating statements and statements incriminating other defendants after police officers had promised to release them before trial on the condition that they not to leave the city.<sup>286</sup> For instance, in Case 1, the defendant D.P. during his interrogation by the investigator gave the following explanation of his initial confession and pre-trial statements incriminating his co-defendants: “Officers of the organized crime unit told me that they would release me from custody if I confess. After [I was released] I was giving self-incriminating statements because I was afraid to be detained and go back to jail.”<sup>287</sup>

Another defendant in Case 1, O.U., testified outside the presence of the jury that police officers promised to release him from custody as soon as he confirmed the statements given by his co-defendant K.P. (K.P. decided to cooperate with the investigation and incriminate several co-defendants; he was the only defendant who did not recant his pre-trial statements).<sup>288</sup>

In order to verify all of these claims of threats, promises, and violence applied by the police officers against the defendants, presiding judges in some cases questioned the police officers who interrogated the defendants or who were present during interrogations. It is not surprising that none of these witnesses acknowledged any threats or violent acts by the police. As a result, trial judges admitted confessions and other incriminating statements against the co-defendant. Although pre-trial statements were admitted as evidence and presented to the jury, trial judges did not allow defense attorneys to even question whether such statements given to the police were

283. *Id.*

284. *Id.* During direct examination, the defense attorney asked those witnesses whether they knew anything regarding application of torture against defendants. The prosecution objected, and the judge withdrew such questions and advised jurors to disregard them. *Id.*

285. *Id.*

286. Case 1 Transcript, *supra* note 109.

287. *Id.* at Motion to Exclude Evidence (written by D.P.’s counsel, dated Dec. 2, 2005).

288. *Id.* at Hearing on Nov. 21, 2005, Defendant’s Testimony.

voluntary.<sup>289</sup> For example, in Case 1, during the examination of defendant O.U., the trial judge did not allow the jury to consider the following questions asked by defense counsel in the presence of the jury:

Question: Is this [pre-trial] statement truthful?

Answer: No.

Q: Did you give this statement voluntarily?

Judge: The question is not allowed.

Q: What is the origin of this statement?

J: The question is not allowed. Counsel A, you should be aware of the requirement of the law that the "origin" of [pre-trial] statements is verified in the absence of the jury.

Q: Do you often spend time in the company of eleven people unknown to you?

A: No.

Q: Did anyone promise you anything if you give the statement that was read out in court?

J: The question is not allowed.

Q: Did the investigator ask any leading questions during your interrogation?

J: The question is not allowed. . . .

J: Dear members of the jury, please do not consider those questions, which were asked by advocates P. and S. and were not allowed by me. These questions were asked in violation of Article 335 of the Criminal Procedure Code.<sup>290</sup>

In Case 2, when during demonstration of the video recording of his pre-trial statement, defendant A.D. tried to inform the jurors that he had been forced to slander himself and his co-defendant, the trial judge removed him from the courtroom until the end of the trial, but allowed him to participate during closing arguments.<sup>291</sup>

Although trial judges interfered in the examinations of the defendants in all trials and did not allow the defense to explain the reasons for recanting their pre-trial statements in court, it can be argued that jurors could also have doubts that incriminating statements given to the police were voluntary and reliable.

289. Case 1 Transcript, *supra* note 109, Hearing on Nov. 25, 2005, Ruling of the trial judge not to allow questions of the defense.

290. *Id.*

291. The judge explained that he removed the accused because the accused ignored his warnings not to discuss procedural issues in the presence of jurors. Case 2 Transcript, *supra* note 109, Hearing on Sep. 19, 2006.

## 2. Testimonies of Prosecution Witnesses

In Cases 1, 3a, 3b, 4a, and 4b, the state called several witnesses. Some of these witnesses in Cases 3a, 3b, 4a, and 4b identified a defendant as an individual who actually participated in the murder.<sup>292</sup> Other witnesses identified the accused as individuals who were fleeing from the scene of the murder.<sup>293</sup>

In Case 1, the state failed to present any impartial eyewitnesses who could testify that R.K., who was charged with murder, actually stabbed the victim.<sup>294</sup> N.K., the only eyewitness who indirectly linked R.K. with the stabbing of the victim, told the police during the pre-trial investigation (she did not repeat this statement in court) that she saw one of the attackers hit the victim in the center of her stomach with a left hand.<sup>295</sup> According to the prosecution, this statement incriminated him as a murderer of the victim because he was left-handed and all of the other accused were right-handed.<sup>296</sup> In addition, the prosecution presented three witnesses who identified R.K. as one of about ten young men running from the scene of the crime shortly after the attack on the victim.<sup>297</sup> However, none of these witnesses actually saw R.K. attack either the victim or her father.<sup>298</sup> The only co-defendant, who pleaded guilty and did not recant his pre-trial incriminating statements against R.K., gave conflicting statements.<sup>299</sup> In his numerous statements given to the police between May 2004 and December 2004, K.P. never said that he had seen R.K. attack the girl.<sup>300</sup> On the contrary, K.P. told the police that it had been a different young man—either G or A—who killed the girl by stabbing her using his left hand.<sup>301</sup> In January 2005, however, he changed his story and said that it was R.K. who had

292. Case 3a Transcript, *supra* note 109, Hearing on May 31, 2006, Witness' Testimony; Case 3b Transcript, *supra* note 109, Hearing on Apr. 12, 2007, Witness' Testimony; Case 4a Transcript, *supra* note 109, Hearing on May 23, 2007, Witness' Testimony; Case 4b Transcript, *supra* note 109, Hearing on Dec. 20, 2007, Witness' Testimony.

293. Case 1 Transcript, *supra* note 109, Hearing on Nov. 7, 2005, Witnesses' Testimony.

294. *Id.*

295. *Id.* at Trial Judge's Summation to the Jury, at 14.

296. Interview with S.E., *supra* note 111.

297. Case 1 Transcript, *supra* note 109, Hearing on Nov. 7, 2005, Witnesses' Testimony.

298. *Id.*

299. *Id.* at Trial Judge's Summation to the Jury, at 20, 25–28.

300. *Id.* at Trial Judge's Summation to the Jury, at 20–27.

301. During interrogation on December 12, 2004, K.P. told the police that G had stabbed the victim. On December 29, 2004 K.P. told the police that it had been A, not G, who had stabbed the victim. Neither G nor A had been charged with the murder of the victim and were not among the accused in Case 1. On January 26, 2005, K.P. once again changed his story and told the police that neither G nor A had participated in the commission of the crime. *Id.* at Trial Judge's Summation to the Jury, 27–28

stabbed the girl.<sup>302</sup> Shortly before this dramatic change in his story, K.P. actually admitted that blood stains on his jeans belonged to the murdered victim because he had been standing near her body during the attack.<sup>303</sup> As mentioned in the previous section, according to several respondents interviewed by the author, this fact was used by the police officers against K.P. to extract the statement incriminating R.K. in exchange for dismissing the murder charges against K.P.<sup>304</sup>

In Case 2, the state called three eyewitnesses who saw either the attack or the group of young men running away from the scene of the crime. None of the witnesses could identify any of the defendants.<sup>305</sup>

In Case 3a and Case 3b, the state called an anonymous eyewitness using the alias “Ms. Tatyana Larina,” who identified only one of the accused—V.O.<sup>306</sup> Ms. Larina said she saw the actual attack against the victim and could identify V.O. because she had seen him previously on several occasions.<sup>307</sup> In order to guarantee the safety of the witness, the prosecution did not disclose any personal information about the witness to the defense or the jury.<sup>308</sup> Only the presiding judges could see her face in court and had access to her personal information.<sup>309</sup> The prosecution, however, used different ways to present the witness to the jury in the first and the second trials. According to the prosecution’s counsel interviewed by the author, the presentation of the witness in the second trial was handled better, and this could have had an impact on the outcome of the case—conviction.<sup>310</sup> During the first trial, Ms. Larina testified while sitting in a separate room of the courthouse and communicated with the parties and jurors via a judge.<sup>311</sup> The jurors could not see or hear the witness, and the witness could not see anyone in the courtroom, including the defendant whom she identified during the identification parade.<sup>312</sup> During the second trial, Ms. Larina again testified from a different room, but was interacting

302. *Id.*

303. *Id.*

304. Interview with N.P. *supra* note 110; Interview with I.B. *supra* note 110; Interview with S.P., *supra* note 110.

305. Case 2 Transcript, *supra* note 109, Trial Judge’s Summation to the Jury, at 25–26.

306. Case 3a Transcript, *supra* note 109, Hearing on May 31, 2006, Anonymous Witness’ Testimony; Case 3b Transcript, *supra* note 109, hearing on April 12, 2007, Anonymous Witness’ Testimony.

307. *Id.*

308. *Id.*

309. *Id.*

310. Interview with T.S., *supra* note 111; Interview with D.M., *supra* note 111.

311. *Id.*

312. *Id.*; Case 3a Transcript, *supra* note 109, Hearing on May 31, 2006, Anonymous Witness’ Testimony.

with the jurors via a videoconferencing system.<sup>313</sup> This time, the prosecution allowed the jury to see the witness on the video screen, but the picture was darkened to avoid identification of the witness's face.<sup>314</sup> Moreover, this method allowed the witness to see the defendants and identify V.O. in the dock.<sup>315</sup> It should be noted, however, that Ms. Larina identified only one of the four defendants, which means that three accused were not incriminated by her testimony.

In Case 4a and Case 4b, the prosecution called two eyewitnesses who testified in court that they saw how the defendant had killed the victim.<sup>316</sup> The defense, however, presented their pre-trial statements which had been given to the police on the day after the murder.<sup>317</sup> In their pre-trial statements, the witnesses provided a description of the offender's physical appearance, which was completely different from the appearance of the defendant.<sup>318</sup> Moreover, more than one hundred days after the murder—but just three days before R.P. was identified as the murderer during the identification parade—one of the eyewitnesses had drastically changed the description of the murderer.<sup>319</sup> The defense in its cross-examination and closing argument highlighted these significant contradictions. For instance, on the day following the murder, witness G.M.-V. gave the following description of the killer: male, 20–25 years of age, 175–180 cm (5 feet, 9 inches – 5 feet, 11 inches) tall, athletic, heavily-built, blonde hair, massive neck. Three days before the identification parade G.M.-V. changed his description of the killer's age: "Earlier I said that the attacker was 20–25 years of age. However, I cannot definitely say so because I drew such conclusion from my stereotypes that such crime could not be committed by a teenager." Moreover, the witness significantly changed his description of the height and the body type of the killer: 170–175 cm and a lean, athletic build.

As mentioned above, the defendant was only 15 years of age, not 20–25. According to the description of R.M. given by his lawyer in the court transcript and the lawyer of the victim during the interview with the author,

313. Case 3b Transcript, *supra* note 109, Hearing on April 12, 2007, Anonymous Witness' Testimony.

314. *Id.*

315. *Id.*

316. Case 4a Transcript, *supra* note 109, Hearing on May 23, 2007, Witnesses' Testimony; Case 4b Transcript, *supra* note 109, Hearing on Dec. 20, 2007, Witnesses' Testimony.

317. *Id.*

318. *Id.*

319. Case 4a Transcript, *supra* note 109, Hearing on May 28, 2007, Defense Closing Argument; Case 4b Transcript, *supra* note 109, Hearing on Jan. 21, 2008, Defense Closing Argument.



the defendant had brown, not blonde hair, he was neither tall nor heavily built, but, on the contrary, was about 170 cm tall and very thin.<sup>320</sup> During the identification parade another eyewitness said that the defendant “resembled” the offender, but she was not sure that it was the accused who had committed the murder. At both trials, however, she was positive.<sup>321</sup> It appears that any reasonable jury would notice such significant inconsistencies in the statements and testimony of the eyewitness. The jurors simply could have had doubts regarding the reliability of witnesses’ testimonies.

Overall, it can be argued that the prosecution could not present convincing testimony of eyewitnesses in any of these cases. Although in Case 3 and Case 4 eyewitnesses identified the defendant and testified in court, the jury could have doubts regarding the accuracy and reliability of their testimony. In Case 3a, the jurors could be affected by the fact that they did not see or hear the witness in court, and they did not know who she was.<sup>322</sup> In that case, the jurors were deprived of the opportunity to evaluate the strength and reliability of the witness’s testimony “by observing [the] witness’s demeanor whilst testifying in court.”<sup>323</sup> Although the judge instructed the jury that use of an anonymous witness did not contradict the Russian criminal procedure law,<sup>324</sup> the jurors could question whether Ms. Larina was a real witness and not simply a police agent. As V.O.’s defense attorney pointed out in his closing argument: “The prosecution could not provide any reasons as to why this witness was in any danger. The concealment of her identity and examination of the witness from a separate room allows us to assume that, perhaps, the witness testified on the prompt of the prosecution.”<sup>325</sup> Moreover, the defense challenged the reliability of Ms. Larina’s pre-trial statement and testimony on the ground that she could

320. *Id.*; Telephone Interviews with M.M., *supra* note 110.

321. Case 4a Transcript, *supra* note 109, Hearing on May 28, 2007, Defense Closing Argument; Case 4b Transcript, *supra* note 109, hearing on Jan. 21, 2008, Defense Closing Argument.

322. Interview with T.S., *supra* note 111.

323. PAUL ROBERTS & ADRIAN ZUCKERMAN, CRIMINAL EVIDENCE 686 (2010).

324. Case 3a Transcript, *supra* note 109, Hearing on May 31, 2006, Anonymous Witness’s Testimony. According to Article 278(5) of the Russian Criminal Procedure Code, the court may, without disclosing the true information on the identity of a witness, question him out of the view of other participants in the court proceedings if it is necessary for the security of the witness. UPK RF, *supra* note 148, art. 278(5). Although use of anonymous witnesses does not contradict European human rights standards *per se* the European Court of Human Rights held that before granting anonymity to the witness, the investigating authorities and trial judge have to assess “the reasonableness of the personal fear of the witness.” Moreover, the Court explained that “a conviction should not be based either solely or to a decisive extent on anonymous statements.” See *Doorson v. Netherlands*, App. No. 20524/92, 22 Eur. H.R. Rep. 330, 446 (1996); *Krasniki v. Czech Republic*, App. No. 51277/99, Feb. 28, 2006, available at <http://www.bailii.org/eu/cases/ECHR/2006/176.html>.

325. Case 3a Transcript, *supra* note 109, Hearing on May 31, 2006, Anonymous Witness’s Testimony.

not even confidently state the exact number of attackers (she said three or four) who were in constant movement around the victim.<sup>326</sup> The defense also attempted to discredit the witness by claiming that she had been under the influence of alcohol at the time of the attack.<sup>327</sup> In Case 4, both juries could have had serious doubts that eyewitnesses could recollect the physical appearance of the killer.

### 3. Real Evidence

As mentioned above, the prosecution did not present a murder weapon, which was allegedly used by the accused, in any of the trials. In all four cases the killers stabbed their victims multiple times, and there was a great probability that blood would have been left on the offenders' clothes or shoes.<sup>328</sup> In Case 1, the prosecution presented the jeans of one of the accused, K.P., who acknowledged that the jeans were stained with blood from the victim.<sup>329</sup> The prosecution did not charge K.P. with murder, but instead used the bloodstained jeans for obtaining incriminating statements against R.K., whose clothes did not have any bloodstains.<sup>330</sup> In other words, in none of the cases did the state present evidence that could link the defendant charged with murder with the actual killings.

In order to prove the motive of hate in all of the studied cases, with the exception of Case 1, the state presented or referred to racist literature, music CDs, photos in printed and electronic format, video clips depicting racist violence, and other items that were found at the homes of the defendants during search and seizure.<sup>331</sup> Although these items of circumstantial evi-

326. *Id.*

327. Indeed, in her testimony Ms. Larina said that she and her girlfriend were sitting at the children's playground drinking alcoholic beverages. She testified that she had been drinking beer, but her girlfriend, who also testified in court, said that they had been drinking gin and tonic. *Id.*

328. See generally Case 1 Transcript, *supra* note 109; Case 2 Transcript, *supra* note 109; Case 3a Transcript, *supra* note 109; Case 3b Transcript, *supra* note 109; Case 4a Transcript, *supra* note 109; Case 4b Transcript, *supra* note 109.

329. Case 1 Transcript, *supra* note 109, Trial Judge's Summation to the Jury, at 27.

330. Interview with N.P. *supra* note 110; Interview with I.B., *supra* note 110; Interview with S.P., *supra* note 110.

331. In Case 2, the police found in the house of the accused, A.Sh., several newspapers, pictures, four audiotapes with racist music by a Russian band "Kolovrat," a T-shirt with the imprint "Skinhead," and a scarf with imprints "skinhead" and "White power." Audiotapes with nationalistic music and notepads with Nazi symbols, pictures, and slogans were also found in the houses of three other accused in Case 2. In Cases 3a and 3b, the state presented a T-shirt with racist slogans. In Cases 4a and 4b, the state did not present, but only referred to the following evidence found during the search of the accused house: a "White Power" patch, a "Skinhead" metal badge, an application form for joining the "Youth Movement of Russian Patriots," computer files with pictures of swastikas and video clips depicting violent acts against non-Slavic ethnic groups. Case 2 Transcript, *supra* note 109, Trial Judge's Summation to the Jury, at 32, 33, 47, 48; Case 3a Transcript, *supra* note 109; Case 3b Transcript, *supra* note 109;

dence could have proved a hate murder subjectively, none of them could prove that these crimes had been committed by the defendant. As the defense attorney in Case 4b explained in his closing argument:

I despise fascism and what my client used to say [the accused told his friends that he hates individuals of Caucasus ethnicity]. I would like to ask you to disengage yourself from emotions during my presentation of the evidence and listen only to the facts and deliver a verdict on the basis of logic and examined evidence. It should be admitted, that the prosecutor succeeded in proving the guilt of my client in relation to other victims [the accused was convicted of assault against other ethnic minority victims committed on a different date and using a bottle instead of a knife], but not in relation to the victim in [this case].<sup>332</sup>

In Cases 3a and 3b, the state showed video footage to the juries depicting the attack against the victim recorded by a CCTV camera.<sup>333</sup> The footage, however, was of a very poor quality and could not serve as proof of the identity of any of the defendants.<sup>334</sup>

## B. Exculpatory Evidence and the Position of the Defense

### 1. Alibi Evidence

Although in Russian criminal trials the onus to prove the guilt of the accused is on the prosecution and the defense does not have any legal duty to prove the innocence of the accused,<sup>335</sup> in all the examined trials all of the accused, with the exception of K.P. in Case 1, claimed that they had not been involved in the murder and had not been present at the scene of the crime.<sup>336</sup> The majority of the defendants claimed that they had been either at home, at work, or with their friends in another place.<sup>337</sup> Most of the defendants, who raised an alibi defense, presented witnesses who were close relatives such as parents, siblings, grandparents, neighbors from the com-

Case 4a Transcript, *supra* note 109, Hearing May 28, 2007, Closing Argument for the Prosecution; Case 4b Transcript, *supra* note 109.

332. Case 4b Transcript, *supra* note 109, Hearing on Jan. 25, 2008.

333. Case 3a Transcript, *supra* note 109, Hearing on May 26, 2006, Presentation of the video to the jury; Case 3b Transcript, *supra* note 109, Hearing on Apr. 3, 2007, Presentation of the video to the jury.

334. *Id.*

335. UPK RF, *supra* note 148, at art. 14.

336. Case 1 Transcript, *supra* note 109, Trial Judge's Summation to the Jury, at 20; Case 2 Transcript, *supra* note 109, Hearing on Oct. 4-6, 2006, Closing Arguments of the Defense; Case 3a Transcript, *supra* note 109, Hearing on July 10, 2006, Closing Arguments of the Defense; Case 3b Transcript, *supra* note 109, Hearing on June 9, 2007, Closing Arguments of the Defense; Case 4a Transcript, *supra* note 109, Hearing on May 28, 2007, Closing Arguments of the Defense; Case 4b Transcript, *supra* note 109, Hearing on Jan. 25, 2008, Closing Arguments of the Defense.

337. *Id.*

munal apartment,<sup>338</sup> friends, employers, and co-workers. In Case 2, two accused also provided written documents proving that they had been at their place of work during the time when the crime had been committed.<sup>339</sup>

Obviously, the prosecution attempted to undermine the credibility of the alibi witnesses by arguing that relatives and friends had an interest in the outcome of the case or could hardly remember what they had been doing on the date of the murder.<sup>340</sup> Indeed, it seems incredible that the witness in Case 1 could recollect that she had visited the house of the defendant on the night of the murder more than a year after that date. Some of the alibi witnesses, however, argued that they could recollect the date of the murder due to some special events in their lives. For instance, witnesses in Cases 4a and 4b could remember the date of the murder because that date (May 25<sup>th</sup>) was the “Last Bell” day in school.<sup>341</sup> Apparently, the jury in Case 1 rejected the alibi defense in relation to almost all defendants,<sup>342</sup>—including R.K., who was charged with murder of the girl—because it convicted the defendants of hooliganism.<sup>343</sup> In Cases 2, 3a, 4a, and 4b the defense succeeded in obtaining acquittals,<sup>344</sup> and alibi witnesses may have had some impact on the not guilty verdicts.

## 2. Racialized Defenses

According to Alfieri, the defendants and defense attorneys in trials of racial violence—lynching in particular—can employ so-called racialized or lynching defenses such as jury nullification, victim denigration, and diminished capacity.<sup>345</sup> Only in one of the cases (Cases 3a and Case 3b) did the

338. Communal apartments were a very common type of housing in the Soviet Union and are still used in Russia, especially in big cities such as Moscow and Saint Petersburg. Tenants in communal apartments share kitchen and washroom facilities.

339. Case 2 Transcript, *supra* note 109, Trial Judge’s Summation to the Jury, at 33, 39.

340. Case 2 Transcript, *supra* note 109, Hearing on Sep. 25, 2006, Closing Argument of the Prosecution; Case 3a Transcript, *supra* note 109, Hearing on July 10, 2006, Closing Argument of the Prosecution; Case 3b Transcript, *supra* note 109, Hearing on June 9, 2007, Closing Argument of the Prosecution; Case 4a Transcript, *supra* note 109, Hearing on May 28, 2007, Closing Argument of the Prosecution; Case 4b Transcript, *supra* note 109, Hearing on Jan. 25, 2008, Closing Argument of the Prosecution.

341. The Last Bell is a traditional ceremony in the schools of Russia symbolizing the end of the school year for high school graduates. The Last Bell Day usually falls on May 25 of each year.

342. One of the accused, R.Z., was acquitted on all counts.

343. Case 1 Transcript, *supra* note 109, Jury Verdict.

344. Case 2 Transcript, *supra* note 109, Jury Verdict; Case 3a Transcript, *supra* note 109; Jury Verdict, Case 4a Transcript, *supra* note 109, Jury Verdict; Case 4b Transcript, *supra* note 109, Jury Verdict.

345. See, e.g., Anthony V. Alfieri, *Lynching Ethics Toward a Theory of Racialized Defenses*, 95 MICH. L. REV. 1063 (1997); Anthony V. Alfieri, *(Er)Race-ing an Ethic of Justice*, 51 STAN. L. REV. 935 (1999); Anthony V. Alfieri, *Race Prosecutors, Race Defenders*, 89 GEO. L.J. 2227 (2001).

defense attempt to apply some racialized defense tactics. Even though, as mentioned previously, the main defense in Case 3a and Case 3b was the alibi defense, several defense attorneys attempted to stain the victim's reputation by alleging that he was involved in drug trafficking.<sup>346</sup> For example, in Case 3a during cross examination of the victim's friend, who was also a student from Congo, the defense attorney asked the following questions:

Defense counsel: Clarify, besides studies did Epassak [victim] do anything?

Witness: He was just a student.

D: Do you know what source of income he had?

The presiding judge did not allow the question as irrelevant.<sup>347</sup>

....

D: Do you know anything about the victim's drug use?

The presiding judge did not allow the question as illegal.

....

D: What time did you usually visit the victim?

W: Usually, I used to visit him during the day.

D: If you used to visit him during the day, does it mean that the victim did not always attend the lectures?

The presiding judge did not allow the question as irrelevant.<sup>348</sup>

In Case 3b similar questions but with even stronger allegations of drug trade were posed to another witness who was the victim's roommate:

Defense: You said that the victim did not do anything besides his studies. What was the source of his living?

The presiding judge did not allow the question as irrelevant to facts of the case.

346. It is a general stereotype that migrants from Central Asia and Africa usually control and are involved in drug trafficking in Russia. See, BELIKOV, *supra* note 3, at 50. It should be noted that some defense attorneys who participated in Case 1 also mentioned during their interview with the author that they believed that the father of the murdered girl was perhaps involved in drug dealing and even used his daughter as a "drug mule" (Russian term— container). To support this theory the lawyers pointed at the following facts: the victim had a little backpack, which disappeared from the scene of the crime; the victim's family were renting an expensive apartment in the center of Saint Petersburg; several members of the victim's extended family were either convicted for possession or trafficking of narcotics. The defense attorneys suggested that there was a commercial interest in this case. For example, the attack on the victim's family could have been organized by another drug dealer. The defense, however, did not introduce this theory to the jury on ethical grounds. Interview with A.Akh., *supra* note 110; Interview with S.O., *supra* note 110; Interview with I.B., *supra* note 110.

347. In Russian jury trials, presiding judges play a very active role during the examination of witnesses, and they decide on their discretion whether the question is allowed or not without the objection from the opposing party.

348. Case 3a Transcript, *supra* note 109, Hearing on May 24, 2006, Witness' Testimony.

Defense: Do you know anything about the victim's involvement in drug trade?

The presiding judge told counsel that any questions regarding the character of the victim could not be asked. The question could be considered as an attempt to defame the victim.

Witness: E. [the victim] did not even smoke. He had nothing to do with narcotics.<sup>349</sup>

By these attempts to label the deceased as a drug dealer, the defense could have aimed to reduce the sympathy of the jurors towards the victim. Although the defense in these trials did not necessarily argue that the victim was worthy of killing, it seems that it aimed at least to imply that the victim was unworthy of redress.<sup>350</sup> In addition to the attempts of denigration of the victim, the defense in Case 3a and Case 3b tried to appeal to the jurors' pro-Russian bias and pointed to their moral obligation to protect the members of their own ethnic group.<sup>351</sup> Thus, in his closing argument in Case 3a, advocate V.M. made the following statement: "I, of course, love people of all ethnicities including Negroes.<sup>352</sup> But the defendants in this case are ethnic Russian people and we, as ethnic Russians, must protect our own people wherever they are."<sup>353</sup> During the second trial, the same defense attorney made similar racialized comments in his opening statement and closing argument. Thus, in his opening statement, the defense attorney urged the jury "to consider the case objectively and fairly with a feeling of patriotism and pride for our Russian Slavic nation."<sup>354</sup> After this phrase, however, the presiding judge interrupted the defense counsel and asked the jurors to disregard the lawyer's statement, explaining that jurors must render the verdict not on the basis of ethnicity, but on the basis of facts alone.<sup>355</sup> On the same ground the presiding judge also interrupted the closing argu-

349. Case 3b Transcript, *supra* note 109, Hearing on Feb. 13, 2007.

350. See Alfieri, *supra* note 345, at 1074.

351. Case 3a Transcript, *supra* note 109, Hearing on July 10, 2006, Closing Arguments of the Defense; Case 3b Transcript, *supra* note 109, Hearings on Feb. 13, 2007, Opening Statement of the Defense; Case 3b Transcript, *supra* note 109, Hearings on June 9, 2007, Closing arguments of the Defense.

352. According to court transcripts in both Case 3a and Case 3b, some defense attorneys often used the racial term *Negro* (*negr*) instead of victim (*poterpevshii*) or deceased (*ubityi*). The presiding judge in Case 3a also noted the use of this term. According to the judge, the defense disparaged the victim: "They called him Negro with disdain." Interview with V.K., *supra* note 112. As mentioned above, however, the standard of the Russian language is different in relation to this racialized term. See *supra* note 131.

353. Case 3a Transcript, *supra* note 109, Hearing on July 10, 2006, Closing Arguments of the Defense.

354. Case 3b Transcript, *supra* note 109, Hearings on Feb. 13, 2007, Opening Statement of Defense.

355. *Id.*

ment of the advocate after he made the following remark: “The fate of four lads is in your hands. There are ethnic Russians in the dock and we, ethnic Russians, must protect ethnic Russians.”<sup>356</sup> The analysis of the court transcripts demonstrates that the presiding judges in both trials prevented the defense counsel from developing racialized defense theories.

## VI. PRE-VERDICT PUBLICITY

Since all of the studied cases were high-profile in nature, they were widely covered by the press, on television, and on the Internet.<sup>357</sup> Several interviewed participants assumed that some of jurors could have had exposure to out of court information released in the newspapers and other media outlets, however, they could not say that it was a decisive factor. For instance, the judge in Case 1 said she was sure that publications could not have had influence on the case because most of the publications asserted that the defendant was the murderer.<sup>358</sup> The same opinion was expressed by the prosecutor in Case 1.<sup>359</sup> In Case 2, although the judge supposed that some of the jurors had received information from media reports, he could not say for sure that it had significant influence on the jury because in many newspaper articles, there were only references to the interview with Mr. Zaitsev, the Saint Petersburg City Prosecutor.<sup>360</sup> In Cases 4a and 4b according to the victim’s lawyers, publications did not affect the not guilty verdict of both juries.<sup>361</sup>

The situation in Case 3a, however, was much more complicated. According to the presiding judge in that trial,<sup>362</sup> one of the Saint Petersburg

356. *Id.* at Hearing on June 9, 2007, Closing Arguments of the Defense.

357. It would be very difficult to provide the entire list of articles and reports covering all six trials. Below are the references to some publications. Marina Garina, *Podozrevaemykh v ubiistve tadzhikskoi devochki budut sudit' prisiazhnye* [Accused of Tajik Girl's Murder Will be Tried by Jurors], IZVESTIYA, September 22, 2005, available at <http://www.izvestia.ru/incident/article2715779/>; Pavel Gorshkov, *Prisiazhnykh zhdet nelegkaia rabota* [Jurors Will Have a Tough Job], FONTANKA, October 19, 2005, available at <http://www.fontanka.ru/2005/10/19/151314/>; Azhur, *Obviniaemyi v ubiistve tadzhikskoi devochki otkazalsia ot vsekh pokazanii* [Accused Charged with Tajik Girl's Murder Recant all Pre-trial Statements], FONTANKA, January 27, 2006, available at <http://www.fontanka.ru/2006/01/27/157251/>; Aleksandr Samoilov, *Prisiazhnye ne khotiat, sudy ne mogut* [Jurors Do Not Want, Court Cannot], NOVAYA GAZETA V SANT PETERBURGE, March 30, 2006, available at <http://www.novayagazeta.spb.ru/2006/23/5/>; Aleksandr Samoilov, *Korichnevaya osen'* [Brown Fall], NOVAYA GAZETA V SANT PETERBURGE, September 28, 2006, available at <http://www.novayagazeta.spb.ru/2006/74/2/>.

358. Interview with T.E., *supra* note 112.

359. Interview with S.E., *supra* note 111.

360. Interview with I.M., *supra* note 112.

361. Telephone Interview with M.M., *supra* note 110 (Case 4a); Interview with S.Ts., *supra* note 110 (Case 4b).

362. Interview with V.K., *supra* note 111.

newspapers, *Novyi Peterburg* [New Peterburg], published a series of articles in which the journalist Nikolai Andrushchenko<sup>363</sup> insisted that the police and the office of the prosecutor had framed four innocent Russian youths.<sup>364</sup> The author of the newspaper articles claimed that there was absolutely no evidence against any of the accused and accused the judge of bias against the defense.<sup>365</sup> According to the trial judge, these newspapers were distributed in court to the public.<sup>366</sup> The prosecutor also asserted that newspapers were handed out to jurors in front of the courthouse, and some newspapers were even found in the jury deliberation room.<sup>367</sup> Moreover, the trial judge and the prosecutor believed that the audience was well organized and active during the trial; they made repeated comments and reacted to the behavior of the prosecutor.<sup>368</sup> The prosecutor alleged that the audience represented an organization *Rus' Pravoslavnaia* (*Orthodox Rus'*).<sup>369</sup> It is unclear, however, why the judge tolerated such disrespectful and disruptive behavior of the audience and did not remove them from the courtroom as allowed by the Russian law.<sup>370</sup> Pre-verdict publicity and pressure of the audience on the jury in Case 3a were among the grounds against an acquittal, and they will be discussed below in the section on appellate review of verdicts.

363. It is interesting that after the second trial (Case 3b), which resulted in the conviction of all the defendants, and shortly after author's research trip to Saint Petersburg, journalist Nikolai Andrushchenko was arrested and charged with several offences including insult of a representative of the authority (several prosecutors) and incitement of social hatred. In June 2009, he was convicted of these crimes and sentenced with a fine and a conditional jail sentence. However, he was acquitted of extremism and slander charges. See Alexander Samoilov, *Shtraf za oskorblenie vlasti*, *Novaya Gazeta v Sankt Peterburge*, June 25–28, 2009, available at <http://www.novayagazeta.spb.ru/2009/45/7/>; Fontanka, *Delo Nikolaia Andriushenko zakonchilos' shrafom i osvobozhdeniem*, FONTANKA, June 22, 2009, available at <http://www.fontanka.ru/2009/06/22/071/>.

364. See Nikolai Andrushchenko, *Kak fabrikuiutsia dela o "russkom fashizme."* *Zhurnalistkoe rassledovanie po materialam ugovornogo dela No. 9749* [How to Fabricate "Russian Fascism" Cases. Journalist Investigation on the Materials of Criminal Case No. 9749], *NOVYI PETERBURG*, April 13, 2006, available at <http://rusk.ru/st.php?idar=110137>; Nikolai Andrushchenko, *Siud'ia Kudriashova ot Starovoitovoi k negru. Metody te zhe!* [Judge Kudriashova from Starovoitova to Negro. The Same Methods!], *NOVYI PETERBURG*, June 15, 2006, available at <http://rusk.ru/st.php?idar=110319>; Nikolai Andrushchenko, *Negra ne ubivali, no na narakh* [They Didn't Kill the Negro, but Are in Jail], *NOVYI PETERBURG*, June 29, 2006, available at <http://rusk.ru/st.php?idar=110354>; Nikolai Andrushchenko, *Kto otvetit za "oshibki" piterskogo "pravosudiia"?* [Who Will be Responsible for "Mistakes" of Petersburg "Justice"?], *NOVYI PETERBURG*, July 6, 2006, available at <http://rusk.ru/st.php?idar=110377>.

365. *Id.*

366. Interview with V.K., *supra* note 112.

367. Interview with D.M., *supra* note 111.

368. Interview with V.K., *supra* note 112.

369. *Pravoslavnaia Rus'* is a Russian right-wing and mainly Anti-Semitic newspaper, whose editor-in-chief, Konstantin Dushenov, was convicted of incitement of hatred in February 2010. See *Rus' Pravoslavnaia*, <http://www.rusprav.org/> (last visited Jan. 4, 2011).

370. UPK RF, *supra* note 148, art. 258.



## VII. JURY VERDICTS

As mentioned above in Part III of this article, all trials with the exception of Case 3b resulted in acquittals of the defendants charged with murder. In Case 3b, all four defendants were found guilty. As opposed to many common law jurisdictions,<sup>371</sup> the Russian law does not require unanimity or even supermajority for either a guilty or a not-guilty verdict. Instead, a simple majority of seven votes is sufficient for conviction, and in the case of a split vote (6–6) the accused is acquitted.<sup>372</sup> Another significant difference between common law jury systems and the Russian jury system is the form of verdict required in criminal cases. Instead of a general verdict of “guilty” or “not-guilty,” the Russian law adopted a Continental European or French three-question system: (1) Has it been proven that the charged act took place?; (2) Has it been proven that the defendant committed the act?; and (3) Is the defendant guilty of committing the act?<sup>373</sup> Although the Russian law allows the trial judge to combine all three questions into one question, the Russian Supreme Court has been very reluctant to accept this practice and has reversed many verdicts on the ground that the trial judge failed to cover all three issues within one joint question.<sup>374</sup> A three-question system enables the state, and judges in particular, to determine the grounds for acquittal, or in Thaman’s terms, “to divine the reasoning process of the jury.”<sup>375</sup> It allows the sentencing judge to choose among three options to justify a jury acquittal in their written judgments: the defendant was acquitted because (1) the jury believed that there was no crime committed; (2) the jury believed that the crime was committed by a person other than the accused; or (3) the accused cannot be accountable for the act.<sup>376</sup>

In all of the cases the judges posed three separate questions pertaining to the murder charge against each of the defendants.<sup>377</sup> Since it was ob-

371. See generally Neil Vidmar, *A Historical and Comparative Perspective on the Common Law Jury*, in *WORLD JURY SYSTEMS* 1, 30 (Neil Vidmar ed., 2000) (discussing verdict rules).

372. UPK RF, *supra* note 148, art. 343.

373. *Id.* at art. 339. See also the discussion of verdict forms in Tsarist and post-Soviet Russia in KOVALEV, *supra* note 56, at 450–460.

374. *Id.* at 452.

375. Stephen C. Thaman, *Europe’s New Jury Systems: The Case of Spain and Russia*, in *WORLD JURY SYSTEMS* 319, 344 (Neil Vidmar ed., 2000).

376. NAUCHNO-PRAKTICHESKII KOMMENTARII K UGOLOVNO-PROTSESSUAL’NOMU KODEKSU ROSSIISKOI FEDERATSII 585 (V.M. Lebedev ed., 2003).

377. Case 1 Transcript, *supra* note 109, Jury Verdict; Case 2 Transcript, *supra* note 109, Jury Verdict; Case 3a Transcript, *supra* note 109, Jury Verdict; Case 3b Transcript, *supra* note 109, Jury Verdict; Case 4a Transcript, *supra* note 109, Jury Verdict; Case 4b Transcript, *supra* note 109, Jury Verdict.

vious from the facts of the cases that all victims died as a result of a brutal knife attack, none of the juries doubted that the crime had been committed, and all juries were unanimous in affirming the first question.<sup>378</sup> The second question, however, was answered negatively by juries in all cases, with the exception of Case 3b.<sup>379</sup> This means that the juries in these trials found that the prosecution failed to prove that the accused had participated in the killing of the victims.<sup>380</sup> Some of these verdicts were unanimous, but some were decided by a majority vote. The jury in Case 2 unanimously found that the ten accused were not involved in the murder of the victim.<sup>381</sup> However, in relation to two other accused, who were charged with murder in that case, the jury did not reach unanimity, and the verdict was reached by the majority of either 10–2 or 11–1.<sup>382</sup>

The jury in Case 1 acquitted R.K., the only accused charged with murder, by a 9–3 majority.<sup>383</sup> In Case 4a, the verdict was reached by a majority of 10–2 in favor of the accused, but in Case 4b, the second jury had a greater number of minority votes voting against the accused (9–3).<sup>384</sup> In Case 3a, the jury answered the question regarding the participation of the four defendants accused of murder negatively by a majority of nine votes.<sup>385</sup> The re-trial in Case 3b resulted in the majority conviction of 10–2.<sup>386</sup> With the exception of Case 3b, voting results in these cases demonstrate that some jurors were convinced by the prosecution's evidence that some of the accused had participated in the murders of the victims, but they were outvoted by the majority of their fellow jurors.<sup>387</sup> On the one hand, it can be argued that these verdicts did not eliminate all reasonable doubt as to the guilt of some of the defendants. However, such an argument is fair only if the idea of majority verdicts is rejected in favor of a mandatory unanimity rule. Even in the United States, the highest judicial authority held that nine out of twelve jurors or a "substantial majority" or a "heavy

378. *Id.*

379. *Id.*

380. *Id.*

381. Case 2 Transcript, *supra* note 109, Jury Verdict.

382. *Id.*

383. Case 1 Transcript, *supra* note 109, Jury Verdict.

384. Case 4a Transcript, *supra* note 109, Jury Verdict; Case 4b Transcript, *supra* note 109, Jury Verdict; *See also* Kazim Baibanov, *19 prisiazhnykh – odin otvet* [19 jurors – One Answer], GAZETA RU, January 25, 2008, <http://www.gazeta.ru/social/kseno/2598817.shtml>

385. Case 3a Transcript, *supra* note 109, Jury Verdict.

386. Case 3b Transcript, *supra* note 109, Jury Verdict.

387. Case 1 Transcript, *supra* note 109, Jury Verdict; Case 2 Transcript, *supra* note 109, Jury Verdict; Case 3a Transcript, *supra* note 109, Jury Verdict; Case 3b Transcript, *supra* note 109, Jury Verdict; Case 4a Transcript, *supra* note 109, Jury Verdict; Case 4b Transcript, *supra* note 109, Jury Verdict.

majority of the jury” is sufficient to render the verdict of the court and “disagreement of three jurors does not alone establish reasonable doubt.”<sup>388</sup>

In all the cases none of the verdicts in relation to murder charges was based on the vote of fewer than nine jurors or a *substantial* or *heavy majority* of the jury using the language of Justice White in *Johnson v. Louisiana*.<sup>389</sup>

Another way to assess the validity of jury verdicts in these cases would be by contrasting them with opinions of the judges and parties involved in the trial. Unfortunately, the author was not able to interview all the participants in all six of the trials, however, he discussed verdicts with several judges, prosecutors, and defense attorneys.

The most interesting example was Case 1 where all defense attorneys, the lawyer for the victim’s family, the trial judge, and even the prosecutor were of the opinion that the not-guilty jury verdict was sound.<sup>390</sup> For example, in answering the question regarding sufficiency of evidence of guilt and reasonable doubt, the presiding judge said: “Guilt on the count of murder raised doubts. I would also acquit R.K. However, I could not conjecture that they [jurors] would deliver a not guilty verdict.”<sup>391</sup> The victim’s lawyer said that she also had doubts regarding the guilt of the accused charged with murder.<sup>392</sup> According to the lawyer, there was little evidence to support the murder charge and, perhaps, there were some other offenders who had instigated the attack and participated in the murder.<sup>393</sup> The victim’s lawyer rejected the idea that racial prejudice could be a factor in delivering a not guilty verdict: “If the victim was a Russian girl, the verdict would have been the same. There was no prejudice against the victim. I saw the reaction of the jurors, tears in their eyes when they looked at the picture of Khursheda [the victim]. She was so beautiful.”<sup>394</sup> Even the prosecuting counsel acknowledged that she had doubts regarding the guilt of the ac-

388. *Johnson v. Louisiana*, 406 U.S. 356, 362 (1972).

389. Case 1 Transcript, *supra* note 109, Jury Verdict; Case 2 Transcript, *supra* note 109, Jury Verdict; Case 3a Transcript, *supra* note 109, Jury Verdict; Case 3b Transcript, *supra* note 109, Jury Verdict; Case 4a Transcript, *supra* note 109, Jury Verdict; Case 4b Transcript, *supra* note 109, Jury Verdict.

390. Interview with S.P., *supra* note 110; Interview with A.Akh., *supra* note 110; Interview with N.P., *supra* note 110; Interview with B.A., *supra* note 110; Interview with S.O., *supra* note 110; Interview with I.B., *supra* note 110; Interview with T.E., *supra* note 112; Interview with S.E., *supra* note 111.

391. Interview with T.E., *supra* note 112.

392. Interview with N.P., *supra* note 110.

393. *Id.*

394. *Id.*

cused charged with murder. When she was asked whether she considers the verdict just, she answered affirmatively.<sup>395</sup>

In Case 2, in addition to interviewing several defense counsel, the author also interviewed the judge and one of the prosecuting attorneys. On the one hand, the judge refused to express his own opinion regarding the guilt of the accused, who was acquitted by the jury, on the ground that it would be unethical for him to comment on the decision of the judges.<sup>396</sup> On the other hand, however, he doubted that the fact that the victim was of ethnic minority background had any impact on the decision of the jury because the same jury convicted some of the defendants of several other violent crimes committed against other ethnic minority victims.<sup>397</sup> A different assessment of the verdict was given by the prosecuting counsel in Case 2 who thought that the verdict was not just because at least some of the defendants had to be convicted of murder.<sup>398</sup> However, when he was asked whether, on the basis of the evidence presented in court, the guilt or innocence of the accused was manifest or raised doubts, he expressed his personal opinion: "I need to put myself in the jurors' shoes. There was no certainty in that the crime had been committed by all of the accused charged [with murder]. However, some of the accused committed that crime. A suspicion could creep in regarding who actually did what during the commission of the crime. I believe that A.D. participated."<sup>399</sup>

The author interviewed both presiding judges and two prosecutors who participated in Case 3a and Case 3b. Although the verdicts in two trials were completely different,<sup>400</sup> both presiding judges expressed doubts regarding the logic of the verdicts. In Case 3a, where all four defendants were found not guilty, the presiding judge mentioned that if she had tried that case alone, she would have convicted of murder only one of the defendants who had used the knife against the victim.<sup>401</sup> However, the judge had doubts regarding the guilt of the other three defendants in relation to the

395. Interview with S.E., *supra* note 111.

396. Interview with I.M., *supra* note 112.

397. *Id.* In Case 2, the jury found several defendants guilty of five other inter-ethnic assaults. Two accused were found guilty and one not guilty of assault against a Ghanaian citizen, three accused were found guilty of assault against two ethnic Azeri men, one accused was convicted and two were acquitted of assault against a Chinese man, and one accused was convicted of assault against a Palestinian man. Case 2 Transcript, *supra* note 109, Jury Verdict.

398. Interview with S.K., *supra* note 111.

399. *Id.*

400. As mentioned above, in Case 3a, all four defendants were acquitted, and in Case 3b, all four defendants were found guilty of murder charge. Case 3a Transcript, *supra* note 109, Jury Verdict; Case 3b Transcript, *supra* note 109, Jury Verdict.

401. Interview with V.K., *supra* note 112.

charge of murder.<sup>402</sup> In other words, the presiding judge indicated that in this case, there was a situation where the accomplices acted in *excess of the perpetrator*,<sup>403</sup> i.e., there was no convincing evidence that all the defendants agreed to kill and had the intention to kill the victim. Put differently, the judge believed that a required element of murder—intention to cause death of the victim—was not proven by the prosecution in relation to three out of four of the defendants. This means that instead of murder, the presiding judge would have probably convicted three of the defendants of manslaughter or even a lesser crime, such as assault.<sup>404</sup>

The presiding judge in Case 3b, where all four defendants were convicted of murder, expressed a similar opinion. In particular, he said that two of the defendants “perhaps, were not guilty of murder.”<sup>405</sup> According to the judge, “the jurors reasoned that if they hit [the victim], they are the murderers. However, this issue is questionable and narrow-minded (*obyvateľ’skii*).”<sup>406</sup>

In Cases 4a and 4b, in addition to the defense attorney, two lawyers who represented the victim’s family were interviewed. Although one of the lawyers who represented the victim’s family in the first trial (Case 4a) appealed the acquittal, she mentioned in the interview with the author that she did not think that the accused had actually participated in the murder of her clients’ son.<sup>407</sup> According to the lawyer, there were too many inconsistencies in the eyewitnesses’ testimony and pre-trial statements.<sup>408</sup> The lawyer’s doubt of the accused’s guilt might have been a factor in her decision not to represent the victim’s family during the re-trial. A lawyer who replaced her in the second trial, however, had a much more critical opinion of the not guilty verdict calling it “absurd, illegal and ungrounded.”<sup>409</sup> According to him, the verdict was delivered by the jury to help the person who committed a racist murder escape justice. At the same time, the lawyer said that he did not believe that jurors had anything against the victim personally.<sup>410</sup>

402. *Id.*

403. According to Article 36 of the Criminal Code of the Russian Federation, “the commission of a crime that is not embraced by the intent of other accomplices shall be deemed to be in excess of the perpetrator. Other accomplices to the crime shall not be subject to criminal responsibility in excess of the perpetrator.” UK RF, *supra* note 32, art. 36.

404. Interview with V.K., *supra* note 112.

405. Interview with A.K., *supra* note 112.

406. *Id.*

407. Telephone Interview with M.M., *supra* note 110.

408. *Id.*

409. Interview with S.Ts., *supra* note 110.

410. *Id.*

One of the factors that could explain the striking difference between the opinions of the two victims' lawyers in Case 4a and Case 4b respectively, could be the lawyers' differing ethnic backgrounds. The lawyer who represented the victim's family during the first trial was female and ethnic Russian, the same ethnic background as the accused.<sup>411</sup> The victim's second lawyer was male and of Armenian ethnicity and shared the ethnic background the victim.<sup>412</sup> It is possible that ethnic bias could have affected the assessment of the jury verdict by one or both of the lawyers.

Interviews with participants in the six cases revealed that some judges, prosecutors, and victims' lawyers expressed doubts regarding the guilt of the accused charged with murder. The last Part of this Article discusses the appellate review of the jury verdicts.

### VIII. APPELLATE REVIEW OF VERDICTS

One of the peculiar features of Russian and most civil law jury systems is that a not guilty verdict can be appealed and quashed on some legal grounds.<sup>413</sup> The Russian Code stipulates that an acquittal based on a not guilty jury verdict can be quashed only if violations of the criminal procedure (1) restricted the right of the prosecution and victim to present evidence in court; or (2) affected the content of questions submitted to the jury in the verdict form and answers to those questions.<sup>414</sup> At the same time, another provision of the Code states that any judgment of the court, including those based on the jury verdict of not guilty, can be quashed for two other reasons: (3) a verdict returned by an unlawful jury; or (4) violation of the secrecy of the jury room.<sup>415</sup> The Russian Supreme Court has interpreted these exclusive grounds for quashing acquittals very broadly.<sup>416</sup> The Russian appellate practice is filled with reversals of jury acquittals.<sup>417</sup> On the

411. Both the defendant and the victim's lawyer have Russian (Slavic) last names.

412. Both the victim and the victim's lawyer in the second trial have Armenian last names.

413. KOVALEV, *supra* note 56 at 500–502.

414. UPK RF, *supra* note 148, art. 385(2).

415. *Id.* at, art. 381(2).

416. See KOVALEV, *supra* note 56 at 504–516 (for more on grounds for appeal and quashing the verdict by the Russian Supreme Court).

417. Over the past six years the Russian Supreme Court usually quashed between one fifth and one half of all appealed acquittals. In 2010, the Supreme Court considered appeals against 196 acquitted defendants and quashed 39 not guilty verdicts (20%); in 2009 the Court reviewed 205 acquittals and reversed 47 (23%); in 2008 it reviewed 234 not guilty verdicts and quashed 70 of them (30%); in 2006 the Court reviewed 193 acquittals and reversed 87 (45%); in 2005, 72 of 148 appealed acquittals were reversed (48%). Verkhovnyi Sud Rossiiskoi Federatsii, Obzory sudebnoi statistiki Verkhovnogo Suda Rossiiskoi Federatsii [Documents of the Supreme Court of the Russian Federation], available at <http://www.vsrfr.ru/second.php> (last accessed Apr. 21, 2011). For more statistics and analysis of appellate practices; see also KOVALEV, *supra* note 56, at 500–512.

other hand, the rate of reversed convictions is much less significant,<sup>418</sup> which indicates that the appellate practice of the Russian Supreme Court is crime-control oriented and favorable for the Prosecution.

In the six cases, the Supreme Court quashed two of the five acquittals and affirmed three acquittals and one conviction.<sup>419</sup> For the purpose of this Article there are two main issues with respect to the appellate review of the not-guilty verdicts. The first issue is whether either the prosecution or the victims' families in their appeals alleged that there was any violation of the procedural law, which in their opinion could have prejudiced the jurors in favor of the defendants or against the victims and contributed to an unjust not guilty verdict. The second question is whether the Supreme Court identified such violations in any of the cases as possible factors for jury acquittal.

Regarding the first issue, in all cases both the prosecution and the representatives of the victims' families claimed that the defense exerted illegitimate pressure on the jurors by challenging the credibility and voluntariness of the defendants' confessions and other types of prosecution evidence in the presence of juries.<sup>420</sup> For example, on the appeal in Case 1, the prosecutor and the victim's lawyer claimed that the defense repeatedly mentioned in the presence of the jury that the police applied illegal methods of investigation and that this could have influenced the jury in making an erroneous decision regarding the innocence of the defendant.<sup>421</sup> The victim's lawyer in Case 2 argued that the defendants and their attorneys created jury prejudice that the defendants were innocent and misled jurors regarding the admissibility of evidence and how evidence was obtained by the police.<sup>422</sup> In Case 3a, the prosecution in its appeal referred to repeated statements by the defense counsel that the police falsified evidence and obtained confessions by torture even after they were warned by the presiding judge. According to the prosecution, these negative statements per-

418. As opposed to the significant percentage of quashed acquittals the Supreme Court reversed fewer appealed convictions. In 2010, the Supreme Court quashed only 55 guilty verdicts out of 981 appealed convictions (5.6%); in 2009, the Court reviewed 833 convictions and reversed 56 (6.7%); in 2008, the Court considered 724 jury convictions and quashed 66 guilty verdicts (9.1%); in 2006, the Court quashed 78 of 813 appealed convictions (9.6%); in 2005, the Court quashed 101 of 695 appealed convictions (14.5%). Verkhovnyi Sud Rossiiskoi Federatsii, *supra* note 417.

419. Case 1 Appellate Decision, *supra* note 122; Case 2 Appellate Decision, *supra* note 129; Case 3a Appellate Decision, *supra* note 138; Case 3b Appellate Decision, *supra* note 141; Case 4a Appellate Decision, *supra* note 145; Case 4b Appellate Decision, *supra* note 147.

420. *Id.*

421. Case 1 Appellate Decision, *supra* note 122.

422. Case 2 Appellate Decision, *supra* note 129.

sued the jurors of the innocence of the defendant and affected their verdict.<sup>423</sup>

In Case 4a, the prosecution complained that the defense attorney “discredited” prosecution evidence and that in his speech he argued that prosecution evidence presented in court was inadmissible.<sup>424</sup> In Case 4b, the prosecution and the victim’s lawyers appealed, *inter alia*, against the fact that the defense attorney, in his closing argument, impugned the credibility of the prosecution witness by making “unfounded” comments regarding his possible motives to give false statements in court and his feeling of guilt that he could not prevent the murder of the victim.<sup>425</sup>

It is hard to disagree with the arguments of the prosecution and the victims’ lawyers that the defense statements could have influenced the juries in delivering not guilty verdicts in all five cases. The question is, however, whether by making such statements the defense violated the Russian criminal procedure law. The current Criminal Procedure Code,<sup>426</sup> or at least the Code existing at the time when all five acquittals were delivered, does not prohibit the defense from challenging the reliability of the pre-trial statement of the defendant presented by the prosecution as evidence of guilt.<sup>427</sup> The same argument can be made for the defense’s critical assessment of any prosecution evidence presented in court. If the defense is not allowed to challenge prosecution evidence during direct examination of the defendant or cross examination of the prosecution witnesses and critically assess prosecution evidence during closing arguments, it would practically paralyze the functions of the defense. It would undermine several fundamental principles and rights of the defendant guaranteed by the Russian Constitution and the criminal procedure legislation: the adversarial system and equality of arms,<sup>428</sup> the right of the accused to defend himself,<sup>429</sup> the right of the accused to testify in court,<sup>430</sup> the right not to give self-incriminating evidence,<sup>431</sup> and the right of the accused to defend himself by any other means not prohibited by the Code.<sup>432</sup> Moreover, it would undermine international human rights standards of a fair trial including the right

423. Case 3a Appellate Decision, *supra* note 138.

424. Case 3b Appellate Decision, *supra* note 141.

425. Case 4b Appellate Decision, *supra* note 147.

426. As of Feb. 8, 2011.

427. UPK RF, *supra* note 148.

428. *Id.* at art. 15.

429. *Id.* at art. 16.

430. *Id.* at art. 47(4)(3).

431. KONSTITUTSIIA ROSSIYSKOI FEDERATSII [CONSTITUTION] 1993, art. 51 (Russ.).

432. UPK RF, *supra* note 149, at art. 47(4)(21).



to defend oneself in person or through legal assistance<sup>433</sup> and the right to examine adverse witnesses.<sup>434</sup> Prohibiting the defense to criticize prosecution evidence in the presence of juries would place the prosecution in a far more advantageous position and would transform the adversarial trial into a more inquisitorial type of proceedings with the defense playing a peripheral role.

As mentioned, the Russian Supreme Court in its appellate practice explained that any references made by a party about the use of illegal methods of investigation by the police in the presence of juries should be considered as illegitimate pressure on jurors.<sup>435</sup> It is interesting, however, how the Russian Supreme Court resolved this ground for appeal in each of the cases.

Although in Case 1, Case 2, and Case 4b, the Court found that during the trial, the defendants and their counsel attempted to inform the jurors about the use of illegal methods of investigation, the Court noted that the presiding judge in these cases immediately interrupted the testimony of the defendants or did not allow the defense counsel's questions, which aimed to disclose information regarding the use of illegal methods of pre-trial investigation.<sup>436</sup> Moreover, the Court pointed out that the presiding judges advised the jurors to disregard any statements indicating that the accused gave false confessions or false incriminating statements against their co-defendants as a result of coercion and that they must consider only the evidence presented in court.<sup>437</sup>

The Supreme Court arrived at a different conclusion in relation to this ground of appeal in Case 3a and Case 4a. In Case 3a, the Court held that the defense violated the criminal procedure law by ignoring warnings of the judge not to discuss issues of admissibility of evidence in the jury's presence and by starting an argument with the judge regarding a law prohibiting juries to consider such issues.<sup>438</sup> Although the Court acknowledged that the presiding judge repeatedly interrupted the defense counsel and reminded the jury to ignore their inappropriate statements, it concluded that due to the great number of violations of the law,<sup>439</sup> the defense illegally

433. See European Convention, *supra* note 252, at art. 6(3)(c).

434. *Id.* at art. 6(3)(d).

435. Overview of practices, *supra* note 248, at ¶ 4.

436. Case 1 Appellate Decision, *supra* note 122; Case 2 Appellate Decision, *supra* note 129; Case 4b Appellate Decision, *supra* note 147.

437. *Id.*

438. Case 3a Appellate Decision, *supra* note 138.

439. *Id.* The Supreme Court found, *inter alia*, that defense counsels were warned at least thirty times during the trial.

manipulated the jury and influenced its verdict.<sup>440</sup> Moreover, the Court held that the presiding judge erred in failing to sanction the defense counsel for repeated violations of rules of criminal procedure.<sup>441</sup> In Case 4a, the Court held that the presiding judge erred in that she did not always interrupt the defense counsel when he discussed questions of admissibility of evidence in the jury's presence.<sup>442</sup> Moreover, the Court held that the judge failed to remind jurors in her jury instructions before deliberations (*naputstvennoe slovo*) that they should not take into account the defense counsel's remarks regarding inadmissibility of evidence.<sup>443</sup>

An analysis of the Supreme Court decisions reveals a clear distinction between cases where judges do not interrupt and prevent defense counsel from criticizing prosecution evidence and raising issues of admissibility of evidence and where presiding judges do not tolerate such behavior of defense counsel and immediately intervene and instruct juries to disregard and ignore statements of the defense. In the former cases, the acquittal can be reversed, and in the latter cases, the acquittal is more likely to be affirmed unless there are other plausible grounds of appeal. It is hard to agree with the reasoning of the Russian Supreme Court that defense counsel's arguments and statements aiming to discredit the evidence of the prosecution, including allegations of illegal methods of interrogation and other investigative proceedings in the presence of the jury, violate any provision of the Russian Criminal Procedure Code. On the contrary, the practice of prohibiting such statements in court undermines the fundamental principles and rights of the defense guaranteed by the law and international obligations of the Russian Federation.

The prosecution and victims' lawyers also raised some other grounds for appeal. Thus, in Case 1, the prosecution referred to the fact that during 2005, one of the jurors was charged three times with public intoxication,<sup>444</sup> once before the trial and twice during the trial, but failed to notify the court

440. *Id.*

441. *Id.* The Supreme Court provided reference to the provision of the Criminal Procedure Code, which gives the judge authority in cases when the defense counsel does not follow orders of the court to postpone court hearings and inform the bar association about such violations. UPK RF, *supra* note 148, at art. 258(2).

442. Case 4a Appellate Decision, *supra* note 145.

443. *Id.*

444. Administrative violation (*administrativnoe pravonarushenie*) is a type of offense which is distinguished from a crime (*prestuplenie*) and does not bear stigma and consequences of the criminal offense and conviction. A record of administrative violation does not disqualify citizens from the jury service. According to the Code of Administrative Violations, public intoxication is punishable by an administrative fine of between 100 and 500 rubles (between \$3 and \$16) or administrative detention up to 15 days. See KODEKS ROSSIJSKOI FEDERATSII OB ADMINISTRATIVNYKH PRAVONARUSHENIIAKH [KOAP RF][CODE OF ADMINISTRATIVE VIOLATIONS], art. 20.21 (Russ.).

either during jury selection or during the course of the trial.<sup>445</sup> The Supreme Court did not grant the appeal on this ground and explained that neither the trial judge nor the prosecution asked prospective jurors during *voir dire* about charges or convictions for administrative violations and, hence, the juror did not fail to disclose this information during jury selection.<sup>446</sup> Moreover, the Court found that the presiding judge did not ask this question during the trial.<sup>447</sup> Indeed, the law does not require that a juror should volunteer and inform the court of charges of any administrative violations.<sup>448</sup>

The Supreme Court also disagreed with the prosecution in Case 2 regarding allegations that media publications could have influenced the jury.<sup>449</sup> The Court held that such allegations were mere speculations and were not based on any evidence, including court transcripts.<sup>450</sup> Similar allegations were made by the prosecutor in Case 3a.<sup>451</sup> According to the prosecutor, newspapers with publications claiming the innocence of the defendants were distributed in court, but jurors concealed the fact that they read those publications.<sup>452</sup> Even though the Supreme Court did not address this ground for appeal in its decision, it can be suggested that its conclusion was the same as in the Case 2 decision because the prosecution's allegations were not supported by any evidence that jurors actually had publications in their possession or had read such publications.

The Supreme Court found a significant violation of the criminal procedure in Case 4a where the presiding judge refused to grant a motion by the victim's father to postpone trial hearings and not to hear the case on May 25, 2007.<sup>453</sup> That day was the anniversary of the victim's death when the family of the deceased held memorial services and could not participate in court.<sup>454</sup> Instead, the presiding judge continued the trial on that date and examined several witnesses of the defense without the victim's father being present, who was a party to the case.<sup>455</sup> The Supreme Court found a violation of the procedure on the ground that the victim's father had been de-

445. Case 1 Appellate Decision, *supra* note 122.

446. *Id.*

447. *Id.*

448. Federal Law on Jurors, *supra* note 158; UPK RF, *supra* note 148.

449. Case 2 Appellate Decision, *supra* note 129.

450. *Id.*

451. Case 3a Appellate Decision, *supra* note 138.

452. *Id.*

453. Case 4a Appellate Decision, *supra* note 145.

454. *Id.*

455. *Id.*; see also Case 4a Transcript, *supra* note 109, Hearing on May 25, 2007.

prived of the opportunity to cross-examine defense witnesses on May 25.<sup>456</sup> The Court held that participation of the lawyer representing the victim's family could not release the presiding judge from her obligation to ensure the rights of the victim's father.<sup>457</sup> It is hard to disagree with the Court on this ground since Russian law grants the victim the rights of the private prosecutor, including the rights to participate in the court hearings, present evidence, and make motions.<sup>458</sup>

The prosecution or victim's lawyers or victim's families did not make allegations in any of the appeals that the jury delivered its verdict on the basis of ethnic or racial bias against the victim.<sup>459</sup>

### CONCLUSION

This Article, which is based on an empirical study of six high-profile jury trials, examined issues of alleged jury bias against ethnic and racial minority victims in violent hate crimes in Russia. The main purpose of the research was to discover whether there was any evidence to suggest that juries in any of the five trials<sup>460</sup> were influenced by ethnic or racial biases against the victims in delivering not-guilty verdicts. The analysis of court transcripts and interviews with judges, prosecutors, and defense attorneys has revealed that the juries in these cases did not demonstrate any bias against ethnic and racial minority victims. On the contrary, it can be suggested that after hearing the evidence presented, the juries were left with reasonable doubt regarding the guilt of the defendants. In four trials (Case 1, Case 2, Case 3a, and Case 3b) the prosecution based its case mainly on confessions and incriminating statements against the co-defendants, which had been obtained during pre-trial investigation. Although all pre-trial statements of the defendants were allowed as admissible evidence by the trial judges, their voluntariness and reliability can be questioned since torture by police is not uncommon in Russia. Testimony of eyewitnesses in Case 3a, Case 3b, Case 4a, and Case 4b also raise many doubts about their credibility. Moreover, many of the trial participants, who were interviewed by the author, including prosecutors and victims' attorneys, rejected allegations of ethnic and racial bias of juries in these cases. Perhaps only in Case

456. Case 4a Appellate Decision, *supra* note 145.

457. *Id.*

458. UPK RF, *supra* note 148, art. 42.

459. Case 1 Appellate Decision, *supra* note 122; Case 2 Appellate Decision, *supra* note 129; Case 3a Appellate Decision, *supra* note 138; Case 3b Appellate Decision, *supra* note 141; Case 4a Appellate Decision, *supra* note 145; Case 4b Appellate Decision, *supra* note 147.

460. As mentioned above, Case 3b resulted in guilty verdicts for all of the accused charged with murder. Case 3b Transcript, *supra* note 109.

3, with the defense's racialized tactics, an active support group in the public gallery, and aggressive media coverage collectively, could there have been some impact on the jury decision. But even in that case, due to the lack of clear and convincing evidence of the defendant's guilt, including lack of a murder weapon, DNA evidence, and identification by witnesses, it is hard to see the acquittal as jury nullification.

It appears that Russian politicians and lawmakers who propose to abolish jury trials for violent hate crimes cannot use the jury trials explored in this Article to support their arguments. A rational and well-grounded proposal for changes in the existing legislation would require a careful examination of evidence presented before the juries to identify if there was any reasonable doubt of the guilt of the defendants. The analysis presented in this Article suggests that in these cases, including Case 3b, which has resulted in conviction of all four defendants, such doubt existed. Overall, while ethnic or racial bias can potentially be a factor in jury acquittals in other similar cases, any allegations of bias should be verified by independent research in order to halt further jury abolition reforms in Russia, which started with abolition of jury trials for terrorism and espionage cases.